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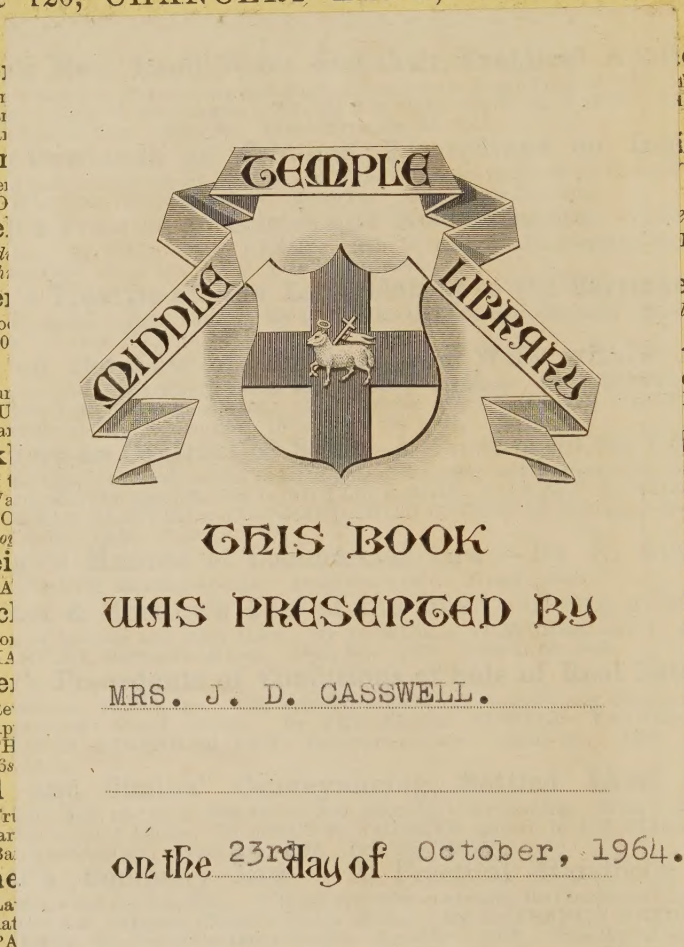

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R. T. Evans

Theory and Practice

OF THE

LAW OF EVIDENCE.

THEORY AND PRACTICE

OF

THE LAW OF EVIDENCE.

BY

WILLIAM WILLS, M.A.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

SECOND EDITION.

BY

THE AUTHOR

AND

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TO

THE HONOURABLE SIR ALFRED WILLS,

ONE OF THE JUDGES OF THE QUEEN'S BENCH DIVISION

OF THE HIGH COURT OF JUSTICE,

THIS BOOK IS

GRATEFULLY DEDICATED.

1894.

PREFACE

TO THE SECOND EDITION.

In this edition the general plan and sub-division of the original work have been adhered to with two exceptions. In the first edition the second chapter of Part II. (Relevant Facts) dealt with Conduct and Character: this head of evidence has been extensively revised and now forms the subject of two chapters entitled respectively Similar Facts and Character. The other alteration is this, that Declarations in Cases of Violence, which were formerly included, like other Declarations, among the Media of Proof, have now been removed to the head of Corroborative Evidence in Part IV. In the important case of the *Queen* v. *Lillyman*, decided by the Court for Crown Cases Reserved in 1896, the grounds of admissibility of this class of Declarations were carefully sifted and their true character finally settled, and it is in accordance with the principle there laid down that this change has been made.

A small extension of the original scheme of the book consists of the addition of a Fifth Part which deals very briefly with the subject of Mis-trial and False Evidence.

The enactment of the Criminal Evidence Act, 1898, has necessitated important alterations in Chapter I of Part III which deals with the Competency of Witnesses. The effect of the various statutes which have repealed in great part the common law rules as to the incompetency of parties and their wives and husbands has been to leave this branch of the law, so far as it relates to criminal proceedings, extremely complicated. Great pains have therefore been taken to state the existing law on this subject fully and clearly.

With a view to increasing the utility of the book both to the student and the practitioner considerable additions have been made to the text on many heads, and the principles set forth have been more amply illustrated than in the first edition, while the land-marks originally laid down have been, with the two exceptions above mentioned, strictly adhered to. At the same time the text has been carefully revised and corrected throughout.

The original preparation of the Appendix of Public Documents was a work of great labour, and it was almost inevitable, in dealing with the mass of statutes involved in this part of the book, that errors should creep in. Great care has been taken in the revision of this Appendix, and it has been expanded to nearly treble its former size by the inclusion of a number of Public Documents not comprised in the first edition. With the view of checking the results arrived at many of the Public Departments which have the custody of these documents have been consulted by the author, who has to express his grateful thanks to the officials of those departments for the assistance received from them. He has also to acknowledge the assistance derived from notes kindly lent to him by Mr. Justice Joyce, and to express his thanks to Mr. J. G. Pease, Mr. Stuart A. Moore and Mr. Hubert S. Moore of the Inner Temple for valuable assistance and suggestions received in connection with different parts of the work.

W. W.
T. L.

Temple,
July, 1907.

PREFACE

TO THE FIRST EDITION.

This Book has grown out of a course of lectures on the Law of Evidence delivered to the Students of the Incorporated Law Society in 1889. It has been written with a twofold aim, namely, to present the theory and general principles of the subject in such a clear and readable form as to be intelligible to the student, and at the same time to combine therewith such amount of detail as may render it of practical utility for the ordinary run of *nisi prius* and criminal work.

The theory of the law is a remarkable one, and a general view of it as a whole appears to me to be very important for a right understanding of many of the practical rules which have flowed from it. It has been set forth, according to my reading of it, in the Introduction, and is further enforced by the arrangement of the whole work and the treatment of its various parts.

To the practitioner as well as to the student the Law of Evidence presents some difficulties. It is not easy, for example, to define exactly the scope and limits of such heads of Evidence as Declarations as to Violence or as to

Pedigree, or Reputation as to Public and General Rights; and the same is true of other titles. Special pains have been taken to present these more difficult parts of the subject in a clear and intelligible form.

The subject of Public Documents, except in so far as it is governed by a few general principles, appears to be little suited for discussion in the body of the text, at any rate in the case of a work of this size; and it has accordingly been reserved in the main for an Appendix, which it is hoped may give sufficient information for ordinary use, and in any case afford, from the method of its arrangement, a ready means of reference.

In attempting to treat, within so small a compass, of so large a subject as the Law of Evidence, it is inevitable that much should be omitted. Such a branch of the law as either Presumptions or Public Documents would suffice alone to fill an ample treatise. It is necessary therefore to make some compromise. In doing this, the aim which I have followed has been, as far as possible, to give most consideration to those parts of the subject which are of greatest practical importance, subject always to presenting a fairly complete view of the whole.

I ought also to mention here that I have omitted from this Book some subjects which are generally included in works on Evidence. Such are Acknowledgments under the Statutes of Limitations, the Law of Estoppel, and almost all Conclusive Presumptions. These have not been included, because they appear to me to belong in principle to other branches of the law.

With regard to the citation of authorities, inasmuch as decisions on questions of evidence are often very briefly reported, and consist very largely of rulings and dicta at *nisi prius*, it has seemed to me to be generally a convenient practice to cite, where possible, several authorities in support and illustration of the same proposition.

I desire in conclusion to express my thanks to my friend Mr. J. G. Pease, of the Western Circuit, for the very valuable assistance that he has given me in many parts of my work, and especially in the preparation of the Appendix of Public Documents and the final revision of the whole MS.

W. W.

4, Paper Buildings, Temple,
October, 1894.

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The Theory and Practice

OF THE

LAW OF EVIDENCE.

INTRODUCTION.

§ 1.—*Definition of the Subject.*
§ 2.—*The Relevant Facts.*
§ 3.—*Forms of Testimony or Media of Proof.*
§ 4.—*Res Gestæ and Narrative.*
§ 5.—*The Adduction of Evidence.*
§ 6.—*The Burden of Proof.*
§ 7.—*Conclusion.*

§ 1.—Definition of the Subject.

Evidence is a term which implies a relation. It means in general any fact or statement of fact regarded as tending, when presented to the mind, to produce a persuasion concerning the existence of some other fact—a persuasion either affirmative or disaffirmative of its existence.

Legal Evidence is a general term given to any fact or statement of fact in contemplation of its being presented to the cognizance of a court of justice for the purpose of producing a persuasion concerning the existence of some other fact or facts which are in question, and upon the determination of which the decision of the court may be based (*a*).

The Law of Evidence is the body of law which prescribes generally what are the relations which must exist between one fact and another in order that the one may be used as

(*a*) Bentham's definitions, slightly modified; see Bentham's Works (1843) Vol. 6, p. 208.

evidence of the other, and by what means and in what manner facts which may be so used as evidence may be brought to the knowledge of the court.

In the system of trial by jury, under which the law of evidence has principally grown up, it is a settled rule that it is for the judge to decide as a matter of law whether any particular fact is fit to be laid before the jury as evidence (*b*) and for the jury, with his assistance, to determine as a matter of fact what weight they will give to it when so presented. Hence the law deals principally with the admissibility of evidence and has little to say as to the weight of it when admitted. And this distinction between fact and law in matters of evidence exists no less in trials without a jury, although the two functions of judge and jury are united in one person.

The broad difference between evidence as defined by law and evidence as commonly understood is that the law imposes numerous restrictions which are not observed in the ordinary intercourse of life. These restrictions have been devised with a two-fold aim: to exclude evidence of all facts save such as have some reasonable connection with the matter in dispute, and to secure that the evidence which is admitted as to these facts shall, so far as rules of law can ensure it, be such as is of a credible character. These considerations have been embodied in two great principles, the application of which to the various cases which have come before the courts has developed almost the whole of the law of evidence.

The first of these principles is that a party may prove all Facts that are Relevant to the Issue and no others.

§ 2.—The Relevant Facts.

The term issue, which literally means "end" and denotes that stage of the pleadings in a cause where the parties have arrived at a simple contradiction of fact, is applied to every

(*b*) *Bartlett* v. *Smith* (1843) 11 M. & W. at pp. 485, 486.

proposition of fact in the pleadings which is affirmed by either of the parties and is denied by his opponent. The full name given to these propositions is "points in issue," or more often "Facts in Issue." These expressions are equivalent, since the term "point" means a "proposition" or "assertion" and the phrase "facts in issue" must here be understood as denoting the conclusions of fact as to which the parties are in contradiction, not the details of fact, also controverted, which will be given in evidence to establish or to defeat them. The system of pleading in our superior courts as it existed in the middle of the last century had the effect of defining the issues in writing with special precision, but issues must of necessity be raised in all litigation, whether written pleadings are used or not, and until they are clearly defined the relevancy of any particular matter of evidence cannot be properly tested nor can judgment be rightly given in the case.

In every such issue one of the parties alleges and the other denies some act or transaction or series of acts or transactions, simple or complex as the case may be, such as a demise by lease and a breach of covenant, an accord and satisfaction, a murder, or the like. When any such transaction is in issue before the court every constituent part of it is a step in the proof of it, as for instance, in the case of a demise by lease, the signing, sealing and delivering of the lease, and the entry of the lessee into possession of the demised premises. Hence all such facts as these, which go to constitute the transaction which is in issue, are necessarily Relevant to the Issue. What facts do thus compose and constitute any given transaction which is in issue is a matter which is determined partly by the substantive law applicable to it and partly by the incidents of the particular transaction itself. Thus the law defines what constitutes a valid demise, but the entry into possession, which is an essential part of the transaction, may in one case consist of a single act, and in

another of a series of acts, as various parts of the premises are taken into occupation. So again, if possession was taken under the lease by an agent of the lessee, the authority given to the agent, as well as the acts constituting his entry into possession, will be relevant facts. Hence the question how far it is legitimate to go into detail and incident in proving the several constituent parts of any transaction depends largely on the circumstances of the particular transaction itself. But it may also be affected by another cause, namely the inability to present to the court the testimony of eye-witnesses as to some fact which is a constituent part of the transaction, whence it becomes necessary to establish such fact by proving a number of details which were connected with it, forming the surrounding circumstances of which it is, so to speak, the centre, and which details when established make it certain or probable that such central fact did itself happen or exist. This is well exemplified in many cases of secret crime where almost the whole of the evidence is circumstantial. A like result also happens in other cases where evidence is given by eye-witnesses as to the very transaction itself, but doubt is thrown on their truthfulness or accuracy, as may be seen in greater or less degree in almost every case where there is a strenuous contest between the parties: in such cases the minutest circumstances and details of the transaction in dispute may assume importance as relevant facts.

As every constituent part or detail of the fact or transaction in issue is or may become a relevant fact, so the converse proposition is generally true, that no facts, however similar to those in issue, are relevant, unless they can be shown to be so connected with them as to form in some sense part of the same transaction. The most notable application of this doctrine is this, that, save in a few special instances, a man's previous conduct and character are not considered relevant to the issue whether he did or did not do a particular act.

Hence, although it is impossible to give in brief terms a definition of the Relevant Facts which shall embrace every relation between one fact and another that may render the one relevant to the other, it may be said that they are for the most part such facts as form the parts and details of the particular transaction in question, whether they be the principal elements in it or only its subordinate incidents, together with such further facts as may be necessary to identify or explain them.

The second great principle of the law of evidence assumes that the relevant facts have been defined and has for its aim to secure the credibility of the evidence by which they are to be proved. The principle is this, that a fact must be proved by means of the Best Evidence which the nature of the case will admit. But this principle is hardly more than a maxim (*c*), and its import can only be understood by reference to the numerous subordinate principles or rules by which it has been worked out. These fall under two heads, of which the first comprises those rules which relate to the various Forms of Testimony or Media of Proof which the law admits in proof of the relevant facts.

§ 3.—Forms of Testimony or Media of Proof.

All the relevant facts (with the exception of those of which the jury can take cognizance by their own senses, as for instance by the view of a house in an action for dilapidations or the inspection in court of a stolen jewel or of a deed charged to be forged) must be presented to the court through the medium of some form of narrative or record. It was early laid down that the best, that is, the most credible, means of proof was the oral testimony, delivered upon oath in open court, of a competent witness who had with his own senses

(*c*) This is apparent on an examination of the authorities for the principle, which will be found in Best on Evidence, 9th ed. 1902, § 87, p. 73.

perceived the particular fact to be proved. Not every person was competent to testify even of such facts: a witness might be defective in mental capacity or might be disqualified by the bias of self-interest; and until recent times the latter ground of incompetency was far-reaching in its effects, disqualifying all the parties to the proceedings as well as other persons related to them in certain defined ways. Assuming however that the witness was competent, it was the sanction of the oath, the appearance for examination and cross-examination in court, and the direct personal knowledge of the witness, which were deemed the best conditions for the ascertainment of the truth, and thus Direct Oral Testimony was early regarded as the principal medium of proof.

The condition as to direct personal knowledge is best known through the familiar maxim *Hearsay is no Evidence:* that is, the witness must not repeat as evidence the statements of other persons. Necessity however compelled the admission of exceptions. It frequently happened that a person who had direct personal knowledge of some important fact died, having however previously made a statement about it to some other person, or left a record of it in writing, in circumstances which made it probable that the statement or record could be relied on as trustworthy, while its exclusion from evidence might be productive of great injustice. Accordingly in certain cases the law permitted a witness to prove statements of fact made to him by other persons who had since died. These are technically known as Declarations, and the persons who make them as Declarants, though these terms do not import that the statement need be in writing or made in any particular form. The dying statements of a murdered man as to how he came by his death, and the written entry of a transaction recorded by a clerk or agent in the course of his duty, are examples of such declarations; and the characteristic of them both is this, that the evidence of the fact is presented, so to speak, through two witnesses, the deceased

man who had direct personal knowledge of the fact, and the living witness who repeats his statement to the court. The living witness complies with those conditions of direct oral testimony which require his appearance for examination in court, and the sanction of the oath, but violates the remaining condition which excludes hearsay evidence and requires direct personal knowledge; his information is second-hand, and in this respect he plays the part of a mere reporter who brings into court the informal testimony of another person. The deceased man on the other hand, whose statement is thus reported, had that direct personal knowledge which is required in a witness, though he cannot appear in court to be sworn nor be cross-examined as to his knowledge and recollection. But his resemblance to a living witness goes further than this, for the law requires, before his declaration can be received, that it shall be shown to possess some guarantee of credibility in lieu of that sanction which the oath affords. The Declaration of the Dying man as to who it was that slew him must be proved to have been made when he had the fear of approaching death before his eyes, and when in fact it was imminent, else it cannot be given in evidence against the man who is charged with having killed him. The law deems that what a man says at such a solemn moment is as likely to be true as if he had sworn to its truth in open court. In like manner the statement of the deceased clerk is considered *primâ facie* credible only if it is shown that it was a Declaration made in the regular Course of his business, and that it was his Duty to make it.

Thus even where it is impracticable to insist on the best evidence of all—an eye-witness's sworn testimony in court—the law, regarding such evidence as a standard or type, has sought, as far as possible, to secure like characteristics in the other forms of testimony which it admits. There are several however among these in which the departure from this

standard is greater than in the declarations just referred to. When it is sought to prove the ancient origin or long enjoyment of Public Rights; or to establish a Family Pedigree, it is not practicable to insist that only those statements of deceased persons shall be admitted in evidence which are confined to facts within the declarant's own personal knowledge; in such cases therefore declarations are admitted although they may present the result of hearsay without any definite limit of time, in other words what is known as tradition. The only guarantees of credibility which the law exacts are, first, that the declarant himself, and those from and through whom the tradition has come down to him, shall all have belonged to the class of persons interested in learning and transmitting a true account of the matter, namely, in the one case the persons interested in the ancient right, in the other the members of the particular family; and secondly, that the declaration shall not have been made after a controversy had already arisen in which the declarant might be interested, since that would raise a just suspicion of bias and prejudice. In the case of other exceptional forms of testimony the analogy or resemblance to the leading type, direct oral evidence, is still less marked, as for instance in the case of Public Documents, such as registers of births deaths and marriages. The law gives credit to the entries in such documents because it may be presumed, till the contrary is shown, that the officials who prepared them duly performed their public duties and ascertained the truth of the facts which it was their office to record. Of all these exceptions the most important in practice, though less striking than some of the others as an example of the general theory which governs them all, are Admissions and Confessions; that is to say, statements which have been made out of court by a party to the proceeding and against his own interest therein, and on that ground presumed to be true and allowed to be proved against him by his opponent.

The broad distinction between these media of proof and the relevant facts provable by means of them was well stated by Parke B. in the following passage, though it does not of course pretend to be a complete summary of the law on this point:

> One great principle in this law (the law of evidence) is, that all facts which are relevant to the issue may be proved; another is, that all such facts as have not been admitted by the party against whom they are offered or some one under whom he claims, ought to be proved under the sanction of an oath (or its equivalent introduced by statute, a solemn affirmation) either on the trial of the issue or some other issue involving the same question between the same parties or those to whom they are privy. To this rule certain exceptions have been recognised; some from very early times on the ground of necessity or convenience; such as the proof of the quality and intention of acts by declarations accompanying them; of pedigrees, and of public rights by the statement of deceased persons presumably well acquainted with the subject, as inhabitants of the district in the one case, or relations within certain limits on the other. Such also is the proof of possession by entries of deceased stewards or receivers charging themselves, or of facts of a public nature by public documents (*e*).

Direct oral testimony and these various forms of indirect testimony have never possessed any uniform collective title. The latter, when regarded merely as portions of the testimony of the living witness, are correctly described as exceptions to the rule against hearsay. But they are also capable, as we have seen, of being themselves regarded as informal depositions of deceased or absent persons which the living witness simply lays before the court. This appears indeed, when the definitions of them are examined, to be their most striking aspect, and accordingly many of them have, as such, independent names, as declarations, admissions, confessions, and the like. It appears convenient therefore to apply to them and to direct oral evidence one general title which may fitly denote their common character; and although it is

(*e*) *Wright* v. *Doe* (1837) 7 A. & E. 313, at p. 384.

impossible to choose any term which is entirely free from objection, it seems that on the whole they may most aptly be called Forms of Testimony or, more shortly, Media of Proof. Direct oral evidence may then be termed the principal medium of proof, and the various forms of indirect testimony which have been referred to the exceptional or subordinate media of proof. But these expressions must be understood only as indicating their relation to each other in the theory of the law, and not as implying that the subordinate media are only admissible when direct oral evidence is unavailable.

§ 4.—Res Gestæ and Narrative.

From what has been said above as to the relevant facts and the media of proof, it will be gathered that in a large number of cases the relevant facts will consist almost entirely of acts of the parties or their agents or their predecessors in title,—acts which create the rights and liabilities of the parties or which form part of the whole transaction which does so—while the media of proof by which such acts may be proved, will consist of various forms of narratives or records, proceeding either from the parties themselves or from other persons connected in some way with them. This distinction however between Act and Narrative, clear enough in idea, is not always easy to draw in practice. This may be explained by stating the relation between the media of proof and the relevant facts in the following way.

Most acts and transactions which are the ground of legal rights and liabilities are the subject of discussion, either at the time of their happening or afterwards, between the parties engaged in them, their agents, and other persons who feel interested in them. They are, so to speak, like the acts of a drama followed by the criticisms of both actors and spectators. The references thus made to a transaction, whether they be written or oral, stand to the transaction in the relation of narrative to

act narrated. Now the best way, it is true, to prove the transaction would be to call as witnesses the persons who have been actors in it or spectators of it; but this is not always convenient or even possible, for some of them may be hostile to the interests of the party who desires to prove the transaction, and others may be dead or for other reasons unable to attend. In such event, the narrative statements just referred to, although they have not the solemnity of the sworn testimony in open court of an eye-witness, yet in certain cases and subject to certain conditions are allowed, as already stated, to be reported in court by some witness who can prove them to have been uttered or written, as if they were a kind of informal depositions as to the facts they refer to. But a transaction may itself consist in whole or part of statements, as in the case of a libel or slander, or the representations of fact which form the basis of a contract, and the like; or it may, although not consisting of statements, be accompanied so closely by them as to make it difficult to separate them from the transaction. And in such cases as these it is often a matter of fine distinction to say at what particular point the transaction is to be deemed complete, so that all further statements connected with it must be regarded as merely references to it and not parts of it. And the practical importance of the distinction is this, that whereas if the statements form part of the transaction they are at once admissible as relevant facts, they are not necessarily admissible if they are only narrative in their character, since not all narrative statements regarding the relevant facts are admitted as media of proof, but, as explained above, only such as comply with certain prescribed conditions.

Thus, A sues B for slanders uttered in the course of a quarrel. Towards the close of the dispute B made an offer of peace, involving an admission that he had been in the wrong, coupled however with a somewhat offensive expression, from which express malice (which is one of the issues in

the action) might perhaps be inferred. The offer was made on the condition that if A refused it, it should be regarded as never having been made. A refuses it. Is B's offer and statement a part of the transaction in issue, so that it can be given in evidence against him as such, or should it be regarded as merely a reference to the quarrel? In the latter case it may be held not admissible, since admissions which are made with a view to settlement and on the terms that they shall not be given in evidence against the party making them, are generally privileged.

Again, A sues B for breach of warranty of the quality of certain goods which B has sold and delivered to him. The bargain was made between A and an agent of B, who had authority to sell the goods on his behalf. A tenders in evidence to prove the warranty a statement made by B's agent at the interview when the goods were bought. B objects to its admissibility on the ground that the bargain had already been struck at the time when it was made. If it was made by the agent in order to induce A to buy, it is clearly part of the transaction; but if it was only a comment on the quality of the goods after they were bought, it would not generally be admissible, as an agent has not ordinarily any authority to bind his master by observations unnecessary for the conduct of any business in hand and referring merely to transactions already completed.

Again, A is indicted for having assaulted B, who, on being struck, cried out that she was hurt, and afterwards made a complaint about A to a friend. Is the complaint, like the cry, to be regarded as part of the transaction, or is it a subsequent narrative of it? If the latter, is it admissible as a medium of proof, and, if so, under what conditions? (*g*)

(*g*) This question has been solved since the date of the first publication of this book by the important case of *R.* v. *Lillyman:* see below, pp. 346 *seq.* It will be found that the authorities cited in that case illustrate well the distinction referred to in the text.

It is in connection specially with questions of this kind that statements which are held to be part of the transaction in issue, and so relevant facts, are termed Res Gestæ (*h*), in order to distinguish them from those statements which are merely Narrative; and it is in the solution of such questions that the law draws with some nicety the boundary line between the relevant facts on the one hand and narratives, which may or may not be admissible as media of proof, on the other.

§ 5.—The Adduction of Evidence.

The second set of rules which work out the principle that the facts must be proved by the Best Evidence that the nature of the case will admit, consists of those which have been laid down as to the Adduction of Evidence, or, in other words, as to the particular manner in which testimony, both oral and documentary, must be presented to the court. They might be described in brief as the rules of procedure relating to evidence. Thus a party is not entitled to examine his own witness in such manner as to prompt what he shall say on any disputed point, nor may he ask him questions for the mere purpose of creating a conviction of his truthfulness when his character has not been attacked. On the other hand, a party is entitled not merely to prompt but to press his opponent's witness, by means of leading questions, to accept in whole or part his own version of the facts in issue. He is entitled also, if the witness repudiates that version, to cross-examine him within certain limits on matters not relevant to the issue, in order to impeach his credibility as a witness in the cause, a part of evidence which occupies a far wider field in practice than the space allotted to it in the theory of the subject would seem to import. The adduction of documents is governed by rules having a similar object, the ascertainment of the truth. All documents which have not a public

(*h*) See further as to this term, p. 92 below.

official character must, if not admitted, be properly verified by evidence before they can be read to the jury. If possible, the original must be produced in court, so that it may be inspected. It is only in certain events, carefully defined, that a copy or oral evidence of its contents may be adduced instead.

It is apparent from what has been said above that the term Evidence is used in several different senses or relations, and that when it is contended in any given case that a particular document, or the answer to some proposed question, is not admissible as evidence, this phrase may cover different grounds of objection according to the circumstances. For example, A, the tenant of a large farm, is prosecuted for the murder of B, who was his landlord. The prosecutor seeks to prove that five years previously a notice to quit a small close had been served on behalf of B upon A, and tenders in evidence a copy of an entry made in a notebook, kept by a deceased clerk of B, stating the service by such clerk of the notice to quit. The circumstances of the case might be such that this evidence might be objected to on the part of the defence as inadmissible on any of the following grounds:—(a) that the service of the notice to quit was not *relevant* to the issue whether A murdered B, being too small and insignificant a circumstance to form a motive for the crime; (b) that the entry of the deceased clerk was not an admissible *medium of proof*, inasmuch as it appeared that it was no part of the clerk's duty to make such entry; (c) that the entry could not be *adduced* in evidence by means of the copy, because no good ground had been shown for dispensing with the production of the original.

§ 6.—The Burden of Proof.

There are some matters of which no proof need be given at all, because the court is bound to take judicial notice of them. There are other matters as to which the law makes certain

presumptions which alter what would otherwise be the burden of proof in the first instance. It is convenient to group these together under the general title Burden of Proof, and to deal with that part of the law, in what appears to be its logical place, namely before the others.

The order of the subject therefore will be as follows:—Burden of Proof, Relevant Facts, Media of Proof, Adduction of Evidence. To these has now been added a further part dealing with Mis-trial and False Evidence.

§ 7.—Conclusion.

Finally, three considerations have to be borne in mind in connection with the rules and examples contained in this book.

The first is this, that the rules hereinafter contained are applied principally to the facts in issue. It constantly happens in the course of a case that evidence is given of small matters which are not in dispute, merely for the purpose of introducing or completing the setting, so to speak, of some part of the story, and so rendering it more intelligible to the jury, just as in a speech it is necessary not to present the important facts in too bare a manner, if they are to be followed with ease by the listeners. It also frequently happens that a contest will arise as to some point connected in a merely remote and subordinate way with the issue. With regard both to the admissibility and the mode of proof of such matters as these, which are often spoken of as the fringe of the case, the judge has a wide discretion, and in so far as they are admitted in evidence they are often proved in an informal manner.

The second consideration is this, that even with regard to the proof of the facts in issue some of the rules of evidence have lost something of their ancient sanctity, at any rate in civil cases. Since 1851, when the parties to a civil cause were first rendered competent witnesses in their own behalf and liable as such to cross-examination, the quantity of direct

evidence available for the proof of the issues has been generally much ampler than was formerly the case; it seldom happens now that victory depends on the admissibility of some small piece of disputable evidence; and the relative importance of some of the rules by which the admissibility of evidence is determined is thereby somewhat diminished. Moreover, one of the causes to which this and other changes in the law are due, namely an increase in the confidence shown in the popular tribunal, has operated to discourage generally a too strict insistence on the letter of the law. With regard to civil cases the result is that while a party will be well advised to equip himself so as to comply with the requirements of the law of evidence, it will not always be politic for him to insist upon his strict rights as against his opponent. In the administration of the criminal law the charge has been much less; the defendant, it is true, is now competent to give evidence, but the parties are not at liberty to dispense by admission or agreement with the strict proof of the facts in issue, and hence the practice in regard to evidence has not been relaxed as in the civil court.

The third consideration is this. It is a natural result of the change just referred to that far fewer decisions upon points of evidence are reported now than was formerly the case, and this is especially true of the civil court, where no new trial can be obtained by reason of the improper admission or rejection of evidence at the trial, unless in the opinion of the court some substantial wrong or miscarriage has been occasioned within the meaning of Rule 6 of Order XXXIX. And hence in a work on evidence it is necessary, for the purpose of illustration, to resort for the most part to old cases. But while these are admirable for the purpose of illustrating the law, the reader ought, in judging of the weight of any decision, to observe the date when it was rendered, and to bear in mind the changes, both in the provisions of the law and in the spirit of its administration, to which we have adverted.

Part I.

BURDEN OF PROOF.

The phrase Burden of Proof is not a very exact one and can only be fully understood by considering in detail its different applications. But it forms a convenient general title for the group of subjects placed in this Part which are closely connected together.

In Chapter I are discussed those matters which require no proof at all, being Judicially Noticed, and as to which therefore it may be said that no burden of proof lies on either party.

Chapter II deals with a different aspect of the burden of proof, namely its incidence on one party or the other by reference to the pleadings. The rules as to the Burden of Proof as determined by the Pleadings are rules of law the application of which to any given case is not affected by the evidence which may be actually given. The Right of a party to Begin depends upon them and therefore falls within the same chapter.

Lastly, the burden of proof is often said to lie on a party in another and different sense, when it is intended to convey that so far as the case has proceeded that party has failed to produce conviction on the judge or jury, either because his evidence has been deficient or because it has been rebutted by contradictory evidence. It is in this sense only that the burden of proof is often said to shift from one party to the other in the course of a case, and it is principally this meaning of the term which is intended when it is said that

the burden of proof is cast on one party or the other by some particular presumption. The term when thus applied does not necessarily import any rule of law, unless some presumption of law happens to have been called into operation to shift the onus of proof, but amounts merely to a statement of the effect of the evidence which so far has been given in the case. This head of the subject so far as it may be said to have hardened into law or recognised practice is treated in Chapter III under the title of Presumptions.

CHAPTER I.

JUDICIAL NOTICE.

§ 1.—*Law and Practice of the Courts.*
§ 2.—*Public Acts and Matters connected with the Government of the Country.*
§ 3.—*Matters of Fact of Common and Certain Knowledge.*
§ 4.—*Assisting the Memory of the Judge.*

THERE are certain matters of which, although put in issue, no proof need be adduced, the judge being bound to recognise their existence and to direct the jury to assume them. They consist partly of matters of law and partly of matters of fact, and are so various that it is difficult to summarize them; but it may be said that they consist for the most part of the law of England, the practice of the courts, public acts and matters connected with the government of the country, and such matters of fact as are of common and certain knowledge. The principle therefore does not apply to particular facts of which the judge or a member of the jury may have special means of knowledge; in order that these may be taken into consideration, they ought to be testified on oath in the ordinary way by the persons who can prove them (*a*).

The principle has also a large application in the case of public documents, statutory rules and regulations, and documents of various kinds authenticated by the seals of officers of state and others; but this part of the subject may be ranged more conveniently under Part IV relating to the

(*a*) As to private knowledge of judge, see *Hurpurshad* v. *Dyal* (1876) L. R. 3 Ind. App. 259, 286; *R.* v. *Antrim JJ.* [1895] 2 Ir. R. 603, 649; *R.* v. *Galway JJ.* (1897) 31 Ir. L. T. R. 160. As to that of a juryman, see *R.* v. *Rosser* (1836) 7 C. & P. 648.

Adduction of Evidence, and the reader is accordingly referred for the same to Chapter VII of that Part and to Appendix A.

§ 1.—Law and Practice of the Courts.

This comprises every branch of the unwritten law of England (as common law, equity, maritime and ecclesiastical law) (*b*), and all general customs, such as the custom of banker's lien and other customs of the law merchant (*c*), or such as have an extended local application, as the customs of gavelkind and borough-english (*d*); but not those of less extended observance, known as particular, private, or local customs, such as the agricultural customs of particular counties or those of the city of London, which must be established by some form of evidence (*e*). A custom is a habit or course of dealing so well established in a particular trade, business or market that in transactions in such trade, business or market it is unnecessary to mention it, because it is so well known that it will be taken to be incorporated in the contract unless something to the contrary is said. When first established, customs have to be proved by evidence; but after a time they become so notorious as to require no proof and are judicially noticed. The custom called "the rule of the road" (*f*), the custom for hotelkeepers to hire their furniture (*g*), and that as to terminating the employment of

(*b*) *Sims* v. *Marryat* (1851) 17 Q. B. 281, 292; *Chandler* v. *Grieves* (1796) 2 H. Bl. 606 (n).

(*c*) *Brandão* v. *Barnett* (1846) 3 C. B. 519, 530; cited with approval in *London Chartered Bank of Australia* v. *White* (1879) 4 A. C. 413, 422.

(*d*) *Clement* v. *Scudamore* (1703) 2 Ld. Raym. 1024—1026.

(*e*) The customs of the city may be proved by the certificate of the Recorder of the city. For the custom of market overt in the City of London see *Hargreave* v. *Spink* [1892] 1 Q. B. 25; and for a list of customs so proved, see Phill. Ev. 10th ed. Vol. I. p. 461, note (5). Other customs are proved by the oral evidence of persons versed in them.

(*f*) *Turley* v. *Thomas* (1837) 8 C. & P. 103.

(*g*) *Crawcour* v. *Salter* (1881) 18 Ch. D. 30, 53, 54; *Ex p. Turquand, Re Parker* (1885) 14 Q. B. D. 636. (Judicial notice taken.)

menial servants by a month's notice on either side (*h*), illustrate the hardening of a practice into a recognised custom.

In like manner the judges take notice that the common law of Ireland is the same as that of England, and take notice of her laws as those of England (*i*); but they do not take notice of the laws, usages or customs of Scotland or of those of colonies or foreign countries, which must accordingly be proved as matters of fact (*k*). By the common law judicial notice was also taken of all public acts of parliament and the various matters enacted and declared by them (*l*). Thus the courts have taken judicial notice that the Isle of Ely is a separate administrative division of the county of Cambridge (*m*), that the City of York is likewise a county (*n*), and that Oxford University was a national institution established for the advancement of religion and learning (*o*), since public statutes had so declared. But private acts (unless for the purpose of proof declared to be public) had to be proved by means of a proper copy (*p*); but it is now enacted that every act passed since 1850 shall be a public act, and shall be judicially noticed as such unless the contrary is especially provided by the act (*q*). The matters which are judicially noticed by reason of their being regulated by statute law are very numerous, and some of them, such as

(*h*) *Moult* v. *Halliday* [1898] 1 Q. B. 125. (Judicial notice refused.)

(*i*) *R.* v. *Nesbit* (1844) 2 D. & L. 529, 533; *Reynolds* v. *Fenton* (1846) 3 C. B. 187, 191.

(*k*) *Mostyn* v. *Fabrigas* (1774) 1 Cowp. 161, 174; *Sussex Peerage Case* (1844) 11 Cl. & F. 85, 115; *Brenan's Case* (1847) 10 Q. B. 492, 498; *Prowse* v. *E. & A. S.S. Co.* (1860) 13 Moo. P. C. 484, 503.

(*l*) *R.* v. *Sutton* (1816) 4 M. & S. 532, 542.

(*m*) *R.* v. *Isle of Ely* (1850) 15 Q. B. 827.

(*n*) *R.* v. *St. Maurice* (1851) 16 Q. B. 908.

(*o*) *Re Oxford Rate* (1858) 8 E. & B. 184.

(*p*) Viz., an examined or a Queen's printer's copy of the act. See B. N. P. 222 (a), and 8 & 9 Vict. c. 113, s. 3. See below, pp. 228, 239, 460.

(*q*) 52 & 53 Vict. c. 63, s. 9, see pp. 228, 239, 460.

the relative value of the current coins of the realm (*r*), the calendar (*s*), and weights and measures (*t*), are matters of almost daily reference.

Judicial notice was also taken at common law of the course of practice of the superior courts as being itself a part of the law (*u*). But this was not extended to the practice adopted by a newly established court, even though its jurisdiction, created by statute, was the subject of judicial notice (*x*); nor to the practice of inferior courts, which, in like manner, had to be proved by evidence (*y*). Now however the practice both of the superior courts and of the principal inferior courts is for the most part regulated by rules made in pursuance of statutory powers, and is as such judicially noticed.

The principle is curiously illustrated in appeals to the House of Lords which being an appellate tribunal alike for England, Scotland and Ireland is bound to judicially notice, and cannot receive evidence of, their laws; although in the courts below it may have been necessary, if the action were (for example) a Scottish one, to receive evidence on a question of English or Irish law (*z*).

§ 2.—Public Acts and Matters connected with the Government of the Country.

The subject-matters of this section are closely connected with those of the last. They comprise the accession and death of the Sovereign (*a*); the names of the occupants from

(*r*) 33 & 34 Vict. c. 10; 54 & 55 Vict. c. 72.
(*s*) 24 Geo. 2, c. 23; and see p. 24 below, note (*r*).
(*t*) 41 & 42 Vict. c. 49.
(*u*) *Lane's Case* (1596) 2 Rep. 16 b.
(*x*) *Van Sandau* v. *Turner* (1845) 6 Q. B. 773, 784, 785.
(*y*) *Lane's Case* (1596) 2 Rep. 16 b.
(*z*) *Cooper* v. *Cooper* (1888) 13 App. Ca. 88, 101, 104, 109.
(*a*) *Holman* v. *Burrow* (1702) 2 Ld. Raym. 794; *Henry* v. *Cole*, *ibid.* 811.

time to time of the great offices of state (*b*); the appointments of the judges and other judicial officers (*c*); the powers and privileges of the two Houses of Parliament (*d*), and the commencements, prorogations and sessions thereof (*e*), though not particular resolutions recorded on the journals of the two houses, of which evidence must be given (*f*); also the existence (*g*) and extent of territory (*h*) of foreign powers whose independence has been recognised by our own government, and the status of foreign sovereigns (*i*). On like grounds the courts take judicial notice of the division of the country into counties (*k*), but not the particular boundaries of the counties (*l*) nor the situation of particular places within them (*m*), as, for instance, that a particular part of the Tower of London is within the City of London, since parts of it are well known to be within the county of Middlesex (*n*).

§ 3.—Matters of Fact of Common and Certain Knowledge.

When we pass from the domain of law to that of fact, it is more difficult to state with certainty the limits of the rule,

(*b*) *R.* v. *Jones* (1809) 2 Camp. 131; *Whaley* v. *Carlisle* (1866) 17 Ir. C. L. Rep. 792, 815. In the latter case the court took judicial notice, in 1866, that Lord Hawkesbury had been minister of foreign affairs to King George III. in 1803.

(*c*) *Howell* v. *Wilkins* (1828) 7 B. & C. 783.

(*d*) *Burdett* v. *Abbott* (1811) 14 East, 1; *Stockdale* v. *Hansard* (1839) 9 A. & E. 1; cf. *Bradlaugh* v. *Gossett* (1884) 12 Q. B. D. 271.

(*e*) *R.* v. *Wilde* (1682) 1 Lev. 296; *Birt* v. *Rothwell* (1698) 1 Ld. Raym. 210, 343.

(*f*) *R.* v. *Knollys* (1694) 1 Ld. Raym. 10, 15; *Stockdale* v. *Hansard* (1837) 7 C. & P. 731, 736.

(*g*) *Taylor* v. *Barclay* (1828) 2 Sim. 213.

(*h*) *Foster* v. *Globe Venture Syndicate, Ld.* [1900] 1 Ch. 811.

(*i*) *Mighell* v. *Sultan of Johore* [1894] 1 Q. B. 149, 161.

(*k*) 2 Inst. 557; *R.* v. *St. Maurice* (1851) 16 Q. B. 908.

(*l*) *Evans* v. *Getting* (1834) 6 C. & P. 586.

(*m*) *Deybel's Case* (1821) 4 B. & A. 243.

(*n*) *Brune* v. *Thompson* (1842) 2 Q. B. 789; see also *Thorne* v. *Jackson* (1846) 3 C. B. 661; and *Kearney* v. *King* (1819) 2 B. & Ald. 301.

but it does not seem to extend beyond matters of common and certain knowledge. Under this head falls the knowledge of all ordinary terms and allusions in the English language whether historical, figurative, or parabolical, as, for example the meaning of such terms as "Judas" or "Frozen Snake" as applied to a man (*q*). Hereunder come also some of the more obvious phenomena of nature, such as the course of the seasons, and the daily rising and setting of the sun, and the ordinary divisions of time. But while judges have taken notice that in a particular year a given day of the month falls on a certain day of the week, and that the feast-days fall on particular dates, on the ground that these are matters determined by the calendar (*r*), they have refused to take judicial notice that the sun on a particular day of the year rises and sets at a particular hour, and have consequently refused to allow the allegation to be established by mere reference to an almanac having no statutory authority (*s*). In like manner they have refused to take notice of the existence of independent foreign states, unless the same have already received recognition either in some act of parliament or in some official act of state (*t*). And the same principle has been applied to the existence of wars between two foreign nations, or between a foreign nation and this country (*u*).

Whether a fact should be judicially noticed or not must often be a question of degree. This is well illustrated by cases as to the period of gestation, the judge having in some cases taken judicial notice that a certain alleged period is

(*q*) *Hoare* v. *Silverlock* (1848) 12 Q. B. 624, 633.

(*r*) *R.* v. *Dyer* (1704) 6 Mod. 41; *Brough* v. *Perkins*, *ibid.* 81; see above, p. 22.

(*s*) *Collier* v. *Nokes* (1849) 2 C. & K. 1012; *Tutton* v. *Darke* (1860) 5 H. & N. 647, 649, 650.

(*t*) *City of Berne* v. *Bank of England* (1804) 9 Ves. 347; *Yrisarri* v. *Clement* (1826) 3 Bing. 432, 437, 438.

(*u*) *Dolder* v. *Huntingfield* (1805) 11 Ves. 283, 292; *R.* v. *De Berenger* (1814) 3 M. & S. 67, 69.

impossible, and in others admitted evidence upon the matter (*x*).

§ 4.—Assisting the memory of the Judge.

Although the matters to which this principle applies require no proof, yet inasmuch as it imputes to the judge the knowledge of a vast number of subjects of which in fact his knowledge or memory may be imperfect, it is the practice for the parties to be prepared with the proper means of bringing to his mind the matters of which they desire that he shall take notice; and he may refuse to take judicial notice unless they duly assist him in this way (*y*).

In the case of the law this is done by means of recognised editions of the statutes, reports by lawyers of decided cases, and text-books of accepted authority. On the same principle other books and documents which have acquired the reputation of authorities, such as recognised dictionaries and histories of the kingdom (*z*), and charts and maps which fulfil the same conditions may be resorted to, without proof of their accuracy, to assist the memory of the judge as to matters of public notoriety. Thus Lord Hale admitted Speed's Chronicles as evidence of a point of history in Edward III's time (*a*): they were also admitted by Pemberton C. J. to prove the death of Isabel Queen Dowager of Edward II, when the learned judge remarked that he knew not what better proof could be given (*b*). In the suit, heard in 1890, against the Bishop of Lincoln for alleged offences against the law of the church, objection was taken by the promoters to the admissibility of numerous histories and other contemporaneous

(*x*) *R.* v. *Luffe* (1807) 8 East, 193, 201, 207; *Bosvile* v. *Att.-Gen.* (1887) 12 P. D. 177.

(*y*) *Van Omeron* v. *Dowick* (1809) 2 Camp. 42.

(*z*) *Case of St. Katherine's Hospital* (1671) 1 Vent. 149, 151; *Brounker* v. *Atkyns* (1681) Skin. 14.

(*a*) *Case of St. Katherine's Hospital* (1671) 1 Vent. 149.

(*b*) *Brounker* v. *Atkyns* (1681) Skin. 14.

records, pictorial and written, of past controversies and practices in the church relating to the questions in issue, on which records the archbishop had relied in his judgment. The Privy Council held that where it is important to ascertain ancient facts of a public nature, the law admits evidence of that description: they cited the impeachment of Warren Hastings where the House of Lords, proceeding on judicial evidence and advised by the judges, received in evidence Cantemir's History of the Turkish Empire to prove a general custom of the Mohammedan religion; and they overruled the objection (*c*). In recent times it has been held that the Court should take judicial notice of the positions and general names of navigable waters shown on Admiralty charts, as for instance, to establish that the name St. Lawrence occurring in a policy of marine insurance included both the river and the gulf (*d*). Such books or documents, however, are not admissible in evidence in any dispute affecting rights of a private or local nature, nor as conclusive of any matter which is not sufficiently notorious to be judicially noticed. Thus Camden's Britannia was rejected as evidence of a private right, namely, on the question whether by the custom of Droitwich salt-pits could be sunk in any part of the town or in certain places only (*e*). So Nicholl's history of Brecknockshire was held to be inadmissible to prove the precise boundaries of two parishes, which were admittedly coterminous with the boundaries of the two counties, the question in issue, which depended thereon, being the limits of the plaintiff's right of common (*f*); and in

(*c*) *Read* v. *Bishop of Lincoln* [1892] App. Ca. 644.

(*d*) *Birrell* v. *Dryer* (1884) L. R. 9 App. Ca. 345, 352, per Lord Blackburn. So public maps may be used to show the relative positions of places referred to: and this was done in the famous Tichborne trial and in the trial of Dr. Jameson, 1896.

(*e*) *Stainer* v. *Droitwich* (1695) 1 Salk. 281.

(*f*) *Evans* v. *Getting* (1834) 6 C. & P. 586.

like manner the Chronicles of Stowe were rejected as proof of the creation of a particular peerage (*g*).

Where the issue is as to the existence or status of a foreign power, the proper course, if the matter is in any doubt, is for the judge to address questions to the secretary of state, whose certificate in answer is conclusive (*h*). This mode of procedure has received express statutory sanction in the case where questions arise as to the extent of the King's jurisdiction in foreign countries (*i*).

Although in this chapter it has been attempted to classify the matters of which judicial notice is taken, there are not a few cases in which the knowledge which justifies judicial notice being taken is derived through various channels, as in the case, for example, of the depreciation of the value of money since the time of Richard II (*k*), a fact which may be gathered from the statute book and from many other sources.

(*g*) *The Vaux Peerage Case* (1836) 5 C. & F. 526, 538.

(*h*) *Mighell* v. *Sultan of Johore* [1894] 1 Q. B. 149; *Foster* v. *Globe Venture Syndicate, Ld.* [1900] 1 Ch. 811.

(*i*) 53 & 54 Vict. c. 37 (The Foreign Jurisdiction Act, 1890), s. 4.

(*k*) *Bryant* v. *Foot* (1867) L. R. 2 Q. B. 161; L. R. 3 Q. B. 497.

CHAPTER II.

THE BURDEN OF PROOF ON THE PLEADINGS AND THE RIGHT TO BEGIN.

§ 1.—*The Burden of Proof on the Pleadings.*
§ 2.—*The Right to Begin.*

§ 1.—The Burden of Proof on the Pleadings.

Every issue of fact consists of a contradiction: that is of an allegation of fact first put forward by one party and then denied by his opponent; and the general rule as to the onus of proof is this, that the proof of such fact lies on the party who first puts it forward, not on him who denies it. This is sometimes expressed in terms following the rule of the civil law—*ei incumbit probatio qui dicit, non qui negat* (*a*)—by saying that the *onus probandi* is upon the party who affirms and not upon him who denies. This however is a mode of stating the rule which is liable to mislead, as most allegations may be expressed in either affirmative or negative terms, and yet have precisely the same meaning. The Burden of Proof cannot be changed merely by the phraseology of the pleadings, though at one time the courts seemed disposed to favour this view (*b*). It is well settled that when one party pleads a fact, whether negative or affirmative, which his opponent afterwards

(*a*) Dig. Lib. XXII. tit. iii. 2.
(*b*) See note (*q*) on p. 32.

contradicts, the *onus probandi* lies on the former. Thus in an action for malicious prosecution the plaintiff has the burden of establishing that the circumstances of the prosecution were such that as a matter of law there was no reasonable or probable cause for instituting it. This involves the assertion of a negative, but it is an essential part of the plaintiff's case and the proof of the assertion rests upon him (*c*). In an action of ejectment by landlord against tenant based on forfeiture for not insuring the demised premises in accordance with the defendant's covenant in that behalf, it was held that the burden of proving the non-insurance lay on the plaintiff (*d*). And so in an action by a landlord against a tenant for breaches of a covenant to repair, it is indifferent whether the plaintiff alleges in affirmative terms that the defendant permitted certain wants of repair and committed certain acts of dilapidation, or in negative terms that he did not execute the repairs and maintain the premises in the good state and condition prescribed by the covenant. And it is equally immaterial whether the defendant pleads a bare denial of the plaintiff's allegation or meets it with a specific affirmation of the execution of all the repairs which the plaintiff alleges he has not executed. In either case the plaintiff is the party who first alleges the facts in issue, and the defendant is the party who denies them, and the onus of proof and obligation to begin therefore rest on the plaintiff (*e*).

It is sometimes said that the test as to the burden or onus of proof is this, to ask oneself which party will fail if no evidence is given (*f*); this however seems to be rather a

(*c*) *Abrath* v. *The N. E. Ry. Co.* (1883) 11 Q. B. D. 440, 457.

(*d*) *Doe* v. *Whitehead* (1838) 8 A. & E. 571.

(*e*) *Smith* v. *Davies* (1836) 7 C. & P. 307; *Soward* v. *Leggatt*, *ibid.* 613; *Belcher* v. *MacIntosh* (1839) 8 C. & P. 720; *Osborn* v. *Thompson* (1839) 9 C. & P. 337; *Doe* v. *Rowlands* (1840) *ibid.* 734.

(*f*) See cases cited in the last two notes.

statement of the effect of the rule in question than an explanation of the principle which underlies it.

It follows from the above statement that the burden of proof can generally be ascertained by reference to the pleadings, when they are correctly drawn; and that in criminal cases since the most usual plea is Not Guilty, it is generally on the Crown (*g*), while in civil cases, save those of a simple character, the burden of proving some issues will lie on the plaintiff and of others on the defendant.

This correspondence however between the pleadings and the burden of proof is not invariable: there are many statutes which enact that particular acts shall be punishable unless done under certain prescribed conditions, as for instance, under cover of some authority or in the exercise of some right and so forth; and in some of these cases it has been held that, upon the prosecution of a person for committing the prohibited act, the burden of proving the absence of the special conditions does not fall on the party who has to plead it. The common law rule on this subject as established by numerous authorities may be stated as follows:—

(i) where the ground of excuse is not stated in the definition

(*g*) By far the most common plea in criminal cases is the general issue, Not Guilty. Of rarer occurrence are certain special pleas, as the plea of justification under 6 & 7 Vict. c. 96, s. 6, in prosecutions for libel, which may be pleaded in addition to the plea of Not Guilty; and the special plea to an indictment against a parish for non-repair of a highway within it, that some other body or person is bound to repair it, which plea admits the road in question to be a highway. In addition to these there are the special pleas of Autrefois Acquit, Autrefois Convict and Pardon: as to these see Roscoe's Crim. Ev. 12th ed. p. 175; *R.* v. *Taylor* (1824) 3 B. & C. 502; *R.* v. *Sheen* (1827) 2 C. & P. 634; and *R.* v. *Green* (1856) Dears. & B. 113. The burden of proof on each of these special pleas lies on the defendant, and consequently the right to begin will be with him, save in indictments for libel where he has also pleaded not guilty. With regard to these pleas there is this difference between felonies and misdemeanours, that in the former case if the verdict is found for the Crown the defendant is then entitled to plead over to the felony (*i.e.*, Not Guilty)—a rule originally introduced *in favorem vitæ*—while in the case of misdemeanours the defendant is not so entitled as of right: see *R.* v. *Taylor*, *supra*.

of the act prohibited but in some separate section or clause it forms matter of defence and need neither be pleaded nor proved by the prosecutor (*h*) :

(ii) where the ground of excuse is stated in the very definition of the act prohibited, then the prosecutor or plaintiff, in pleading the description of the prohibited act, must always negative therein the matter of excuse (*i*) and as a general rule must also prove it. Thus in prosecutions (under statutes now repealed) for lopping trees (*k*), killing deer, and taking fish (*l*) without the consent of the owner, it was held that it lay on the prosecution to prove the want of consent. And in an action of ejectment by landlord against tenant based on forfeiture for permitting a sale by auction to be held on the demised premises without the consent in writing of the landlord, contrary to the tenant's covenant on that behalf (*m*), in an action for maliciously prosecuting without reasonable and probable cause (*n*), and in an action for penalties for acting as a vestryman without being qualified (*o*), it has been held conformably with this rule that the burden of proving the want of the landlord's consent, and of the reasonable and probable cause, and of the due qualification, lay on the plaintiffs.

(iii) where the application of the last mentioned rule would stultify the enactment or the contract, this is ground

(*h*) *Spieres* v. *Parker* (1786) 1 T. R. 141, 144. A proviso, as distinguished from an exception, seems to have been regarded also as matter of defence : see *R.* v. *Jarvis* (1757) 1 East, 643, note (*e*).

(*i*) *Spieres* v. *Parker* (last note), *R.* v. *Pratten* (1796) 6 T. R. 559 ; *The Apothecaries Co.* v. *Bentley* (1824) 1 C. & P. 538 ; *Taylor* v. *Humphries* (1864) 17 C. B. N. S. 539.

(*k*) *R.* v. *Hazy* (1826) 2 C. & P. 458.

(*l*) *R.* v. *Allen* (1826) Moo. C. C. 154.

(*m*) *Toleman* v. *Portbury* (1870) L. R. 5 Q. B. 288.

(*n*) *Abrath* v. *N. E. R. Co.* (1883) 11 Q. B. D. 440.

(*o*) *Gordon* v. *Williamson* [1892] 2 Q. B. 459, 464, 466.

for holding that upon the true construction of them the burden of proving the matter of excuse or exception was not intended to be cast on the party who charges the prohibited act, although he is bound to allege it in his pleading. This is illustrated by reference to the old game laws which prohibited certain dealings in game unless transacted by persons qualified to kill the same: the enumeration of the persons so qualified was so long and elaborate that it was held that it could not be intended that the prosecution should be bound to give evidence to exclude them all; such a construction of the acts would have rendered it impossible to enforce them (*p*). It seems doubtful however whether any other cases of authority can be cited in support of this departure from the general rule (*q*).

(*p*) *R.* v. *Turner* (1816) 5 M. & S. 206.

(*q*) See per Bowen, L. J., in *Abrath* v. *N. E. R. Co.* (1883) 11 Q. B. D. pp. 457, 458. The statement in the text would not be complete without the following observations. Although the *decisions* as to the incidence of the burden of proof with regard to matters of excuse and exception are almost all in accord with one another, the *reasons* given in support of those decisions have varied considerably. Sometimes, for instance, the decision is rested on the presumption of innocence: see *Williams* v. *East India Co.* (1802) 3 East, 192; in other cases on the presumption against forfeiture: see *Doe* v. *Whitehead* (1838) 8 A. & E. per Littledale J., at p. 576; *Toleman* v. *Portbury* (1870) L. R. 5 Q. B. per Willes, Channell and Brett, JJ., at pp. 291, 294, 295; in others on the presumption of ampler means of knowledge in the party prosecuting: *R.* v. *Turner* (1816) 5 M. & S. 206. It seems possible that these grounds may often have been relied on in order to justify a departure from the supposed doctrine that the burden of proof *primâ facie* depended on whether a pleading was framed in affirmative or negative terms, a mode of stating the rule which was not wholly set at rest by the series of decisions in the years 1836—1840, cited on p. 29, note (*e*): see for example *R.* v. *Turner* (1816) 5 M. & S. per Bayley and Holroyd, JJ., at pp. 211, 213; *The Apothecaries Co.* v. *Bentley* (1824) Ry. & Moo. 159; *Doe* v. *Whitehead* (1838) 8 A. & E. dictum of Patteson, J., at p. 574; *Morton* v. *Copeland* (1855) 16 C. B. 517, 524; *Toleman* v. *Portbury* (1870) dictum of Willes, J., at p. 291. But while it might be going too far to say that such considerations as these have now *no* bearing on the construction to be placed on any statute

The case of *The Glendarroch* (*r*) illustrates the same principle applied not to an exception qualifying an act or matter alleged by the plaintiff, but to one qualifying matter put forward by way of defence. The plaintiffs brought an action against the defendants for non-delivery of goods shipped on the terms of an ordinary bill of lading excepting perils of the sea, but not excepting negligence. The defendants relied on the exception exempting them from liability by reason of perils of the sea. It was not disputed that if the loss by perils of the sea were shown to have arisen from the defendants' negligence, the plea would afford no answer to the plaintiffs' claim; but the question debated was whether it lay on the defendants to prove that the loss by perils of the sea was not due to their own negligence, or whether it was for the plaintiffs to allege and prove such negligence. The exception of the perils of the sea contained no qualifying words limiting its application to cases where the defendants were not guilty of negligence. It was held that the burden of showing that the defendants were not entitled to the benefit of the exception by reason of negligence, lay upon the plaintiffs.

So stands the matter at the common law, whether the question of the onus of proof arises in the case of contract, tort or statute. But the legislature has created certain exceptions to the rule which it is necessary to notice.

There are many statutes which have made various acts criminal if done "without lawful excuse" or "without lawful authority or excuse" (as, for example, being found by night in the possession of house-breaking implements, or in the possession of instruments adapted and intended for making counterfeit coin, &c., &c.), and at the same time have

or contract upon which the question of *onus probandi* arises, it is submitted that the statement in the text is the only sound way of stating the rule and reconciling the great majority of the authorities; and that it is in conformity with the leading case of *Abrath* v. *N. E. R. Co.* (1883) 11 Q. B. D. 440.

(*r*) [1894] P. D. p. 226. And see the cases cited in the judgment of Lopes L. J. at p. 235.

expressly enacted that the proof of the authority or excuse shall be on the party accused, notwithstanding that the absence of the ground of excuse forms part of the definition of the crime. The Larceny Act, 1861 (*s*), Forgery Act, 1861 (*t*), and the Coinage Offences Act, 1861 (*u*), contain numerous examples of such provisions, and like enactments are made in the Sale of Food and Drugs Act, 1875 (*x*), the Explosive Substances Act, 1883 (*y*), and the Merchandise Marks Act, 1887 (*z*).

Inasmuch as the absence of the matter of excuse in these cases forms part of the definition of the crime, it has been held, conformably to the rule of the common law stated above (*a*), that the prosecution must in the indictment negative the existence of the matter of excuse, although the disproof of it is cast by the statute on the accused (*b*).

Notwithstanding that the above-mentioned and similar statutes cast on the accused the burden of disproving that which by the common law it would have lain on the prosecution to prove, it will be noted that the facts which the prosecution have first to establish against him are such as would naturally raise a presumption of guilt against him, so that these provisions cannot reasonably be regarded as harsh. It is more doubtful whether the same can be said of two later enactments of a far more sweeping character relating to proceedings in Courts of Summary Jurisdiction.

The Summary Jurisdiction Act, 1848 (*c*) enacted with regard to summary proceedings before justices that—

> If the information or complaint in any such case shall negative

(*s*) 24 & 25 Vict. c. 96.
(*t*) 24 & 25 Vict. c. 98.
(*u*) 24 & 25 Vict. c 99.
(*x*) 38 & 39 Vict. c. 63, s. 24.
(*y*) 46 Vict. c. 3, s. 4.
(*z*) 50 & 51 Vict. c. 28.
(*a*) See p. 31.
(*b*) *R.* v. *Harvey* (1871) L. R. 1 C. C. R. 284.
(*c*) 11 & 12 Vict. c. 43, s. 14.

any exemption, exception (*d*), proviso or condition in the statute on which the same shall be framed, it shall not be necessary for the prosecutor or complainant in that behalf to prove such negative, but the defendant may prove the affirmative thereof in his defence if he would have advantage of the same.

And the Summary Jurisdiction Act, 1879 (*e*) enacts that—

Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany in the same section the description of the offence in the act, order, byelaw, regulation or other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and if so specified or negatived no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant.

§ 2.—The Right to Begin.

When the party on whom lies the obligation of beginning is prepared with adequate evidence, to begin is generally an advantage, since it enables him to impress his case first on the minds of the judge and jury, and, if evidence be given on the other side, to have also the last word. From this point of view we speak of the right to begin. The rules with regard to it flow from the general principles stated in the last section.

Hence in criminal cases whenever the commission of the offence charged is put in issue by the defendant's plea it is the right and duty of the prosecutor to begin, and to adduce all the evidence which is intended to be given on behalf of the Crown before the case for the prosecution is closed. In civil cases also the right to begin was always determined by

(*d*) Whether particular words in a statute are intended to have the force of an exception within the meaning of this enactment depends on the construction of the particular enactment. A clause which commences with the word "except" will not necessarily fall within this enactment, if the result of so holding would be to render the enactment unworkable. See for example the cases of *Taylor* v. *Humphries* (1864) 17 C. B. N. S. 539; *Davis* v. *Scrace* (1869) L. R. 4 C. P. 172; *Morgan* v. *Hedger* (1870) L. R. 5 C. P. 485; *Copley* v. *Burton*, *ibid.* 489, decided on enactments forbidding the sale of beer, &c. during prohibited hours, "except refreshment for travellers."

(*e*) 42 & 43 Vict. c. 49, s. 39 (2).

reference to the pleadings and not by any admissions the defendant might choose to make in court (*f*), save in the exceptional cases where the defendant was not entitled to plead. One of these cases was where the plaintiff claimed damages which were not essential to his cause of action; the rule of pleading was that the defendant could not plead to such claim of damages, because the plea would be no answer to the action (*g*). And hence it followed that whenever the right to begin turned on the denial or admission of damages which could not be pleaded to, the defendant was entitled to make the admission orally when the case was called on (*h*). Now however Rule 4 of Order XXI, which still dispenses a party from denying damages, provides that they shall be deemed to be put in issue in all cases unless expressly admitted; and hence it would appear that the defendant can no longer acquire the right to begin by admitting the damages at the hearing, since he may admit them expressly on the pleadings and must be taken to have denied them if he does not. Another case where formerly the defendant could not plead was the action of ejectment, in which from the year 1852 to the year 1875 there were no pleadings (*i*). Here too the old rule as to gaining the right to begin by an admission in open court is abolished by the introduction of pleadings, including the right to make admissions on the record (*k*).

The defendant may in his pleading meet the claim against him either by a denial (formerly called a traverse) or by admitting it and pleading other matter which in law is an answer to it (called a confession and avoidance); or he may both traverse it and in the alternative plead matters which avoid the effect of it

(*f*) *Pontifex* v. *Jolly* (1839) 9 C. & P. 202; *Price* v. *Seaward* (1841) Car. & M. 23.

(*g*) Bullen & Leake, 3rd ed. p. 14.

(*h*) *Bonfield* v. *Smith* (1843) 2 M. & R. 519.

(*i*) Namely, from date of the C. L. P. Act, 1852, to the coming into force of the Jud. Acts in 1875.

(*k*) See Order XXI r. 21; Order XXXII r. 1.

if true. If the defendant traverses any material part of the allegations in the plaintiff's claim, the plaintiff has the right to begin, and the rule applies not only where there is a denial of any part of the cause of action, but also where any consequent claim to unliquidated damages is in issue (*l*). If, on the other hand, it appears that these are mere matter of computation, or that they must be merely nominal, then the plaintiff cannot, merely because they are not admitted, claim the right to begin (*m*).

If the defendant confesses the whole of the allegations comprised in the plaintiff's claim, and seeks to avoid their effect by an affirmative case of his own, the right to begin belongs to him. Thus, where the plaintiff sued the defendant for trespassing on his land and destroying a dam thereon, and the defendant pleaded that he was entitled in respect of his mill to receive water from a certain watercourse which flowed by the plaintiff's land, and that the plaintiff by his dam had wrongfully obstructed the flow of water to which the defendant was entitled, whereupon he had abated the same, it was held, upon the plaintiff admitting that he did not claim substantial damages, that the defendant was entitled to begin (*n*). So in an action of ejectment by heir-at-law against a defendant claiming under a will of the plaintiff's *propositus*, where the defendant admitted that the latter died entitled to the property, and that the plaintiff was his heir-at-law, it was held that he had the right to begin (*o*). But where each party claimed as heir-at-law, and the sole point in question was the defendant's legitimacy, the defendant's case was deemed a traverse rather than a confession and avoidance of the plain-

(*l*) *Mercer* v. *Whall* (1845) 5 Q. B. 447.

(*m*) *Fowler* v. *Coster* (1828) M. & M. 241; *Chapman* v. *Rawson* (1846) 8 Q. B. 673.

(*n*) *Chapman* v. *Rawson* (1846) 8 Q. B. 673.

(*o*) *Doe* v. *Barnes* (1834) 1 M. & Rob. 386. *Aliter*, where defendant did not admit that the deceased was entitled at the date of his death. *Doe* v. *Lewis* (1843) 1 C. & K. 122.

tiff's claim, and the plaintiff was entitled to begin (*p*). The same was held, though with less reason, where the plaintiff claimed under a will of the testator which the defendant did not deny in fact, but sought to displace by proof of a subsequent codicil (*q*).

Whenever either party claims the right to begin, he thereby undertakes to offer evidence on that issue in respect of which he has claimed it (*r*); he has no right to begin in the sense of addressing the jury on any issue, or even opening any fact, which he does not intend to prove (*s*).

Where there are several issues, some of which are upon the plaintiff, and some upon the defendant, the plaintiff may begin by proving those only which are upon him, leaving it to the defendant to give evidence in support of those issues upon which he intends to rely; and the plaintiff may then give evidence in reply to rebut the facts which the defendant has adduced in support of his defence (*t*). But whichever course the plaintiff adopts he is bound to complete his whole case upon any issue on which he adduces evidence, and will not be entitled to reserve a portion of his evidence thereon to rebut that which may be given by his opponent (*u*).

Where however in civil cases the strict application of these rules would lead to injustice, the judge has a discretionary power to allow a departure from them. Where for instance it appears that a plaintiff who has closed his case was misled by his opponent into believing that a particular witness whose

(*p*) *Doe* v. *Bray* (1828) M. & M. 166.

(*q*) *Doe* v. *Brayne* (1848) 5 C. B. 655.

(*r*) *R.* v. *Tooke* (1794) 25 St. Tr. 446, 447; *Smart* v. *Rayner* (1834) 6 C. & P. 721; *Oakeley* v. *Ooddeen* (1861) 2 F. & F. 656.

(*s*) *Darby* v. *Ouseley* (1856) 1 H. & N. 1, 8.

(*t*) *Shaw* v. *Beck* (1853) 8 Ex. 392; *Penn* v. *Jack* (1866) 2 Eq. 314.

(*u*) *Brown* v. *Murray* (1825) Ry. & M. 254; *Jacobs* v. *Tarleton* (1848) 11 Q. B. 421; *Jackman* v. *Jackman* (1889) 14 P. D. 62; *Barker* v. *Furlong* [1891] 2 Ch. 172; and cf. cases cited below at p. 313, notes (*n*) and (*o*). The same rule prevails where the counter-claim is merely identical with the defence, *Green* v. *Sevin* (1879) 13 Ch. D. 589. Cf. as to affidavits in reply, *Gilbert* v. *Comedy Opera Company* (1881) 16 Ch. D. 594.

evidence he required would be called by him (*v*) or where he has been taken by surprise by some point raised by his opponent of which no intimation was conveyed to him by the course of the cross-examination of his own witnesses or otherwise (*w*), the judge in the interests of justice may allow him to call evidence in reply. And the same course may be followed in a criminal case, as where, for example, the defendant surprises the prosecution by setting up an *alibi* for the first time in the course of his own evidence (*x*). The judge is also entitled, in the interests of justice, himself to call and examine witnesses; and neither party is entitled without his permission to cross-examine such witnesses on the answers given by them to the judge's questions (*y*).

Evidence in reply appears to be expressly provided for in the case of trial on affidavit in the Chancery Division (*z*), as well as in that of cases heard summarily by justices (*zz*).

The right of addressing the court is so closely connected with that of adducing evidence that it is convenient here to state the rules regarding it.

In civil cases in the High Court the party who has the right to begin or his counsel opens his case and then adduces his evidence. At the close of his case if the opposite party or his counsel does not announce his intention to adduce evidence, and has not during the cross-examination of the plaintiff's witnesses given any document in evidence, the party who began or his counsel has the right forthwith to sum up the evidence (*a*), after which the opposite party or

(*v*) *Barker* v. *Furlong* [1891] 2 Ch. 172, 184.

(*w*) *Bigsby* v. *Dickenson* (1876) 4 Ch. D 24.

(*x*) See *R.* v. *Findon* (1833) 6 C. & P. 132 and cases discussed in Russell on Crimes, 6th ed. vol. 3, pp. 604, 605.

(*y*) *Coulson* v. *Disborough* [1894] 2 Q. B. 316. Cf. pp. 313, 364, 365.

(*z*) Order XXXVIII r. 27.

(*zz*) 11 & 12 Vict. c. 43, s. 14.

(*a*) Order XXXVI r. 36 based on C. L. P. Act, 1854, s. 18. This Rule, though confined expressly to trials with a jury, is followed also in trials before a judge without a jury.

his counsel replies upon the whole case. If however, when the party who begins has closed his case, his opponent announces his intention to adduce evidence, or if he has during the cross-examination of the plaintiff's witnesses given some document in evidence, he or his counsel forthwith opens his case, adduces any evidence, oral or documentary, which he desires to tender and then sums up the evidence on both sides; after which the party who began has the right to sum up the evidence on both sides in reply (*c*).

In superior courts of Criminal Jurisdiction the practice resulting from the statutory modifications of the common law rules on this subject is as follows (*d*):

When the burden of proof is on the Crown the counsel for the prosecution is always entitled to open the case against the prisoner, and is bound to do so when the defendant also is represented by counsel; but where the defendant is not so represented, the counsel for the prosecution not infrequently waives his right to open the case if it is of a simple character requiring no explanation (*e*). All the evidence on behalf of the prosecution is then called.

At the close of the evidence for the prosecution, if the defendant has not given any document in evidence during the cross-examination of the witnesses for the Crown and does

(*c*) Note the distinction between "opening" and "summing up evidence." The right to sum up the evidence does not import the right to address the Court again upon the whole case: *Gilford* v. *Davis* (1860) 2 F. & F. 23. The statement in the text must be read subject to the practice, which obtains to some extent in the Chancery Division, of counsel for the plaintiff summing up the evidence given on his behalf before the defendant opens his case. As to this practice see *Kino* v. *Rudkin* (1877) 6 Ch. D. at p. 103; *Metzler* v. *Wood* (1877) 26 W. R. 125.

(*d*) For the statement in the text see Archbold's Crim. Plead. 23rd ed. 1905, pp. 209—212, 396; Roscoe's Crim. Ev., 12th ed., 1898, p. 189 *seq.* and the statutes 28 & 29 Vict. c. 18, s. 2; and the Criminal Evidence Act, 1898, ss. 1, 2, & 3, which will be found below at p. 468.

(*e*) In no case has the prosecutor the right to address the jury, as he is not a party to the proceeding.

not apply to give evidence himself nor tender witnesses on his behalf, the counsel for the prosecution may, if the defendant is represented by counsel but not otherwise, sum up the evidence; but he may not in doing so comment on the fact that the defendant has not himself given evidence. After this the prisoner or his counsel may address the jury on the whole case. The only case in which there is a right of reply on behalf of the Crown in the above circumstances is where the Attorney or Solicitor General is personally engaged on behalf of the prosecution.

If at the close of the evidence for the prosecution it is announced by the defendant or his counsel that evidence will be given for the defence, the course to be followed will depend on whether the evidence to be adduced consists merely of the evidence of the defendant himself, or comprises the evidence of a witness or witnesses other than himself:

(i) where the only evidence for the defence is that of the defendant himself, he must be called as a witness immediately after the close of the evidence for the prosecution. After his evidence, which may include cross-examination and re-examination, the counsel for the prosecution is entitled to sum up his case and in doing so to comment on the defendant's evidence (*f*). The defendant or his counsel is then entitled to sum up the evidence and reply on the whole case.

(ii) Where the defendant calls a witness or witnesses for his defence, whether he also gives evidence himself or not, the defendant or his counsel may open his case at the close of the evidence for the prosecution, may then adduce any evidence he desires to give in such order as he thinks fit, and at the close of his evidence may sum up the whole case to the jury;

(*f*) *R.* v. *Gardner* [1899] 1 Q. B. 150.

after which the counsel for the prosecution is entitled to reply. This rule applies in strictness where the defendant's witnesses are merely witnesses to character, but in such case it is the practice for the counsel for the prosecution to sum up merely at the close of the evidence for the prosecution, waiving his right to reply. Where the sole evidence given for the defence consists of a document put in during the cross-examination of the witnesses for the prosecution, the counsel for the prosecution is also entitled to reply after the defendant or his counsel has closed his case.

Section 1 (h) of the Criminal Evidence Act, 1898 (*g*) has reserved to the defendant the right of making a statement, as before the Act, in lieu of giving evidence. It is apparently in the discretion of the Court whether such statement should be made before or after the defendant's counsel has opened the defendant's case; if the analogy of section 2 of the Act may be regarded as a guide, it would seem right that it should be made before the address of defendant's counsel. It has always been held that the making of such a statement gives the counsel for the prosecution a right to reply upon it.

In courts of Summary Jurisdiction the complainant and defendant may address the court before adducing evidence, but may make no speeches in reply (*h*).

Where no express provision is made on this subject by statute or rule, as in the case of County Courts, the right and order of addressing the court depend on the special practice fixed by each particular court.

(*g*) For this statute see below, p. 468.
(*h*) *Dymock* v. *Watkins* (1883) 10 Q. B. D. 451.

CHAPTER III.

PRESUMPTIONS.

The term Presumption denotes an inference of the existence of some fact which is in question drawn, without evidence, merely from some other fact already proved or assumed to exist. In our law, following the civil, presumptions are divided into three kinds: presumptions of fact or natural presumptions, rebuttable presumptions of law, and conclusive presumptions of law (*a*). Presumptions of fact consist of those inferences which have never hardened into rules of law, and as to which therefore the judge is not entitled to direct the jury that they are bound as a matter of law to draw them; in other words, they are common probabilities of fact which the jury may draw or not, as in their judgment the circumstances of the case may appear to warrant. Rebuttable presumptions of law, on the other hand, consist of inferences which, either from their frequent probability or on some ground of policy, have been adopted by the law, so that the judge is entitled and bound to direct the jury to draw them, subject to their being rebutted either by some evidence or by some more powerful presumption to the contrary. Conclusive presumptions of law are inferences which the law will not allow to be contradicted by any evidence whatever.

Conclusive presumptions of law hardly appear to belong to the law of evidence at all, since they do not differ from rules of substantive law, except that they are expressed in terms

(*a*) The civil terms were *presumptiones facti* or *naturæ*, *presumptiones juris*, and *presumptiones juris et de jure*.

belonging to the law of evidence. The following may suffice as examples of this class. By the common law it is conclusively presumed that an infant under the age of seven years cannot be guilty of felony, and that a boy under the age of fourteen is unable to commit the crime of rape (*b*). By 7 & 8 Vict. c. 45 s. 2 it is enacted with regard to certain dissenters' meeting-houses that when the instrument of trust does not fix the doctrine and worship to be observed, the actual usage observed for twenty-five years preceding any suit with relation thereto shall be taken as conclusive evidence that the doctrines and worship used may be properly taught and observed at such meeting-houses.

Presumptions of fact are almost infinite in number, corresponding to the innumerable circumstances of human life, and their discussion would require a special treatise on circumstantial evidence (*c*). But while many of them are as special in their character as the circumstances in which they arise, others are of such common occurrence that they are among the common-places of the law courts, and tend to assume the character of fixed rules. Such is the presumption based on recent possession, according to which, in prosecutions for theft or receiving, when the prosecutor has proved that shortly after his goods were stolen they were found in the possession of the prisoner, a presumption is raised against the latter of having stolen or received them, according to the circumstances of the case,—a presumption of fact which is considered sufficient to warrant his conviction, if he does not displace it by some explanation consistent with his innocence (*d*). It is

(*b*) 1 Hale, P. C. 27, 630; *R.* v. *Groombridge* (1836) 7 C. & P. 582.

(*c*) For a systematic analysis of circumstantial evidence, including presumptions of this class, see "An Essay on the Principles of Circumstantial Evidence, illustrated by numerous cases," by the late William Wills, edited by Sir Alfred Wills, 5th ed. 1902.

(*d*) *R.* v. *Langmead* (1864) L. & C. 427. The force of this presumption varies greatly with the circumstances of the case, and depends much on the recency of the defendant's possession after the date when the goods were

convenient to refer to some presumptions of this kind in treating of rebuttable presumptions of law, as they run very closely into one another, and it is often difficult to say whether a presumption is one of law or fact. For this reason some writers have suggested a further class, consisting of mixed presumptions of law and fact; but it seems more reasonable to consider that a presumption must be wholly either one of law or one of fact, and to admit that with regard to some it is not yet determined to which of the two classes they belong.

It is difficult to lay down any general rule as to the effect of a rebuttable presumption of law upon the burden of proof (*e*), and considerable confusion has arisen round the phrase "shifting of the burden of proof." It has been held that the burden of proof on the pleadings, as explained in the last chapter, never shifts; but always remains as a matter of law the same (*f*). But the term is used also in another sense, for when it is said that upon a certain state of the evidence or by reason of some presumption the burden of proof has shifted from the plaintiff to the defendant, all that is generally meant is that the plaintiff has adduced such evidence on the particular issue in question that he must either by virtue of the presumption or as a matter of reason and common sense succeed upon it, unless the effect of it can be displaced by evidence to be adduced by the opposite party, and it is generally sufficient for the defendant to adduce in answer such evidence as casts reasonable doubt on the plaintiff's case; for, if the matter rests there, the burden of proof being in law on the plaintiff, he must fail (*g*).

stolen, the extent of his control over the place where they are discovered, and the character of the articles stolen. It is fully discussed and illustrated in the work cited in the last note, ch. 3, sect. 4.

(*e*) See *Sutton* v. *Sadler* (1857) 3 C. B. N. S. 87.

(*f*) *Pickup* v. *Thames, &c. Insurance Co.* (1878) 3 Q. B. D. 594, at pp. 600, 605.

(*g*) *Abrath* v. *N. E. Ry. Co.* (1883) 11 Q. B. D. 440, especially the judgment of Bowen, L. J.

This meaning of the phrase "shifting of the burden of proof" was much discussed in the case of *Pickup* v. *Thames Insurance Co.* (*h*). That was an action by the owner of a vessel against insurers for a total loss by perils of the sea in which the defendants pleaded unseaworthiness at the commencement of the voyage. The vessel had had to put back eleven days after leaving port, and upon examination two or three weeks after her return was condemned as unseaworthy. The plaintiff's contention was that her condition when examined was due to the bad weather encountered during the voyage; the defendants' was that the bad weather was not of such a character as to compel the return of any sound vessel, and that she must have been unseaworthy at the commencement of the voyage. At the trial the judge directed the jury that though the burden of proving unseaworthiness was in the first instance on the defendants, yet the inability of the vessel to proceed at so early a period in her voyage raised such a presumption that the inability was due to causes existing before she started, that the burden of proof was consequently shifted. The jury found for the defendants, but the court ordered a new trial on the ground of misdirection, and held that although the inability to proceed might in the circumstances be cogent evidence of unseaworthiness, it had not the effect of shifting the burden of proof in law. It may be however that some presumptions of law, as for example that of legitimacy (*i*), do in effect operate to cast on the party against whom they operate, the burden of complete disproof of the presumed fact.

The following are some of the more important rebuttable presumptions, most of them of law, some of fact, and some of uncertain character.

The presumption of innocence, by which it is deemed that

(*h*) (1878) 3 Q. B. D. 594.
(*i*) See below, p. 56.

a person is innocent until proof to the contrary has been given, applies not in criminal cases alone, but also in all civil cases where an allegation of illegality is made (*k*). It seems doubtful whether this presumption is not merely another mode of stating, with regard to issues of a particular class, the general rule as to the burden of proof. And it is doubtful whether they ever conflict, except that it may perhaps sometimes happen in a civil case that a party alleging his innocence of some criminal act may be entitled to have the burden of proving his guilt cast on his opponent, instead of having himself to prove his innocence as the party alleging it. But the presumption of innocence does not entitle a party charged with a crime to plead that he did not intend the natural consequences of an act which he has intentionally committed. The definition of many crimes makes some injurious consequence an essential part of the crime, as wounding with intent to do grievous bodily harm, or setting fire to a building with intent to injure some person. In such cases if the wounding or burning was wilful and was such that its natural consequence would be to cause bodily harm or injury it is presumed that the defendant intended it should have that result (*l*).

An infant between the age of seven and fourteen is presumed incapable of criminal intent, and upon any indictment, therefore, it lies on the prosecution to satisfy the jury to the contrary (*m*). To this presumption the same observation applies as to the last.

A married woman who in the presence of her husband commits a theft, or receives stolen goods knowing them to be stolen, is presumed to have acted under his coercion (*n*).

(*k*) *Williams* v. *East India Co.* (1802) 3 East, 192.

(*l*) *R.* v. *Farrington* (1811) R. & R. 207; *R.* v. *Dixon* (1814) 3 M. & S. 11, 15; cf. *Bromage* v. *Prosser* (1825) 4 B. & C. 247, 255.

(*m*) Steph. Dig. Cr. Law, Art. 26.

(*n*) Steph. Dig. Cr. Law, Art. 30.

It is a strong presumption of fact that a party who destroys conceals or fabricates important evidence, has done so because he knows that such evidence is vital to the case against himself. *Omnia presumuntur contra spoliatorem.* The leading case upon this subject is that of the chimney sweeper's boy who having found a jewel took it to a jeweller to ascertain what it was. The stone having been removed from the jewel under the pretence of weighing it, the jeweller offered the boy three halfpence for it, and on this being declined returned him the socket, but refused to return the stone. In an action of trover for its conversion Pratt C. J. directed the jury, that unless the defendant produced the jewel and proved that it was not of the finest water they should presume the strongest against him, and make the value of the best jewels the measure of their damages, which they did (*o*). This maxim is frequently applied both in the civil and criminal courts. Where the issue in an ejectment was whether the plaintiff was legitimate, the fact that the defendant had procured him to be kidnapped and sent to America when a boy, and had instigated an unjust prosecution for murder against him on his return, was held to raise a violent presumption that the defendant knew of the plaintiff's title, and that as a suppressor he was in the same position as a spoliator (*p*). In criminal trials evidence is frequently adduced to show that the accused has attempted to tamper with the evidence as, in murder trials, by concealing the body or hindering the post mortem examination, and, in these and other cases, by forging documents in order to inculpate other parties, or inventing a false alibi; and the maxim under

(*o*) *Armory* v. *Delamirie* (1721) 1 Strange 505, and Smith's Leading Cases, Vol. 1.

(*p*) *Craig & Annesley* v. *Anglesea* (1743) 17 St. Tr. at p. 1416. The fabrication of false evidence for the purpose of perverting the course of justice is itself a common law misdemeanour, whether the evidence is used or not. *R.* v. *Vreones* [1891] 1 Q. B. 360.

consideration is applied with more or less force according to the circumstances of the case (*q*).

With regard to things which in the ordinary course of events are likely to endure for some period of time, it is often inferred from their proved existence at one point of time that they have continued down to some later moment. This presumption has been applied to a person's tenure of office (*r*), and to the derangement of a man's mental faculties (*s*). It is however a presumption of fact, the strength of which must depend on the natural duration of the subject in question, the period of time elapsed, and the other circumstances of the case. It would seem to assume the character of a presumption of law only in respect of such a subject as a custom, which may endure for an indefinite period when once established (*t*).

The most important subject to which this presumption of fact is applied is the duration of human life (*u*). In the absence of any ground for inferring the contrary, the life of a person proved to have been alive and well on a particular day will be presumed to continue at any rate for some short time afterwards (*x*); but the strength of any presumption that a person's life has continued for any particular period must always depend on his age, health, and the other circumstances of his life (*y*). And whether a party has to prove

(*q*) This presumption and the class of evidence on which it rests is fully discussed and illustrated in "Wills on Circumstantial Evidence," c. 3, s. 7.

(*r*) *Steward* v. *Dunn* (1844) 12 M. & W. 655.

(*s*) *Att.-Gen.* v. *Parnther* (1792) 3 Bro. C. C. 441; *White* v. *Wilson* (1806) 13 Ves. 87.

(*t*) *Scales* v. *Key* (1840) 11 A. & E. 819.

(*u*) See observations upon it by Bowen, J. in *Dalton* v. *Angus* (1881) 6 App. Cas. 740, 781.

(*x*) *Wilson* v. *Hodges* (1802) 2 East, 312; *Nepean* v. *Doe* (1837) 2 M. & W. 894, 910, 913.

(*y*) *R.* v. *Harborne* (1835) 2 A. & E. 540, 544; cf. *R.* v. *Lumley* (1869) L. R. 1 C. C. R. 196; *Re Phené's Trusts* (1869) L. R. 5 Ch. 139; *R.* v. *Willshire* (1880) 6 Q. B. D. 366; *Re Benjamin* [1902] 1 Ch. 723.

the continuance of a person's life up to a certain date or his death before a certain date, in either case such question, being one of fact, must be determined in the same manner. It follows that there is no presumption of law, arising from age or sex, as to survivorship among persons whose death is occasioned by one and the same cause, nor any presumption that they died all at the same time. The question is entirely one of evidence, and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined (*z*). The only presumptions of law made in this matter are the following. By the common law, if a person goes abroad and is not heard of for seven years by those who would be likely to hear of him if living, there is a presumption of law that he is dead; but there is no presumption that the death occurred at any particular point or within any particular portion of those seven years (*a*). This presumption of law does not however appear to extend to the case where a person is merely lost sight of for seven years, but there is nothing to indicate that he went abroad; in such case any inference of his death must be one not of law but of fact, although in practice the period of seven years is often adopted by analogy to the rule of law (*b*). In certain other cases similar provisions, but extending to absence within the realm, have been made by statute. By an act of Car. II (*c*) it is provided that where a *cestui que vie* shall remain beyond the seas, or elsewhere absent himself in this realm by the space of seven years together, and no sufficient and evident proof be made of the life of such person, in any action commenced

(*z*) *Wing* v. *Angrave* (1860) 8 H. L. C. 183.

(*a*) *Doe* v. *Nepean* (1833) 5 B. & Ad. 86, 94; *Nepean* v. *Doe* (1837) 2 Sm. L. C.; 2 M. & W. 910, 912; *Re Phené's Trust* (1869) 5 Ch. 139; *In re Rhodes* (1887) 36 Ch. D. 586.

(*b*) See the general expressions contained in *Doe* v. *Jesson* (1805) 6 East, 80, 85; *Doe* v. *Deakin* (1821) 4 B. & A. 433.

(*c*) 18 & 19 Car. 2 c. 11 s. 1.

for the recovery of such tenements by the lessor or reversioner, such person shall be accounted as naturally dead, and the judge at the trial shall direct the jury to give their verdict accordingly (*d*). Sect. 57 of the statute 24 & 25 Vict. c. 100 (*e*), which prescribes the punishment for the crime of bigamy, provides that nothing therein contained shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time. It has been decided that this section, which makes guilty knowledge on the part of the prisoner an essential element of the offence, throws on the prosecution the burden of proving the existence of guilty knowledge (*f*). The effect of the section therefore is this: under the proviso it is only necessary for, say, a male defendant in the first instance to prove that his wife has been continually absent for seven years; for then it will be no answer for the prosecution to prove that he had no reasonable grounds for believing her to be dead, unless they can further prove that he actually knew her to be living within that period. The proviso has therefore no bearing on the presumption of continuance of life, being applicable to cases where the first husband or wife is proved or admitted to be still living, but it may be said to establish a special presumption of innocence. When however the absence has been for less than seven years, the defendant must prove facts from which the jury may reasonably infer that he honestly and on reasonable grounds believed his first wife to be dead before he married again (*g*).

There is a presumption of law that any person who acts in

(*d*) See, on the construction of this section, *Doe* v. *Andrews* (1850) 15 Q. B. 756.

(*e*) The previous enactments were 1 Jac. 1 c. 11 s. 2; and 9 Geo. 4 c. 31 s. 22.

(*f*) *R.* v. *Curgerwen* (1865) L. R. 1 C. C. 1.

(*g*) *R.* v. *Tolson* (1889) 23 Q. B. D. 168, 183.

a public office was duly appointed or authorised to do so (*h*). Instances of public offices to which this rule has been held applicable are those of churchwardens and overseers (*i*), attorneys and solicitors, police officers, justices of the peace, constables (*k*), incumbents (*l*), deputy county court judges (*m*), vestry clerks (*n*), and an official principal's surrogate (*o*). The presumption holds good in proceedings of every description, civil and criminal. The same principle has been applied in certain cases by statute, as in the case of public officers employed in the prevention of smuggling (*p*). But the presumption has no application to private offices, such, for example, as that of a tithe collector; the existence of these, and the due appointment of their holders, are both matters of fact (*q*). Familiar examples of this latter class are executors and administrators, and trustees in bankruptcy. With regard to public offices there is a further presumption that the duties of those who fill them are performed with regularity: *omnia esse rite acta*. Thus, on an issue as to a settlement, the question was whether a parish certificate, signed some sixty years previously by one churchwarden and one overseer, was valid. By 8 & 9 Will. 3 c. 30 s. 1 such certificate must be signed by a majority of the churchwardens and overseers for the time being, and by 43 Eliz. c. 2 s. 1 there must be two overseers appointed. By local custom there may be one churchwarden only. It was held that it was to be presumed that there was a custom

(*h*) *McGahey* v. *Alston* (1836) 2 M. & W. 206; *R.* v. *Roberts* (1878) 14 Cox, 101.

(*i*) *Doe* v. *Barnes* (1846) 8 Q. B. 1037.

(*k*) *R.* v. *Gordon* (1789) 1 Leach, 515.

(*l*) *Berryman* v. *Wise* (1791) 4 T. R. 366.

(*m*) *R.* v. *Roberts* (1878) 14 Cox, 101.

(*n*) *McGahey* v. *Alston* (1836) 2 M. & W. 206.

(*o*) *R.* v. *Verelst* (1813) 3 Camp. 432.

(*p*) 39 & 40 Vict. c. 36 s. 261.

(*q*) *Short* v. *Lee* (1821) 2 J. & W. 464, 468; *Pasmore* v. *Bousfield* (1816) 1 St. 296.

in the parish of appointing one churchwarden only, and that there had been a regular appointment of two overseers and a subsequent death of one of them (*r*). The court regarded the presumption in this case as one of law.

Another important presumption is this, that rights or alleged rights which have been long enjoyed without interruption are deemed to have had a legal origin, if a legal origin be possible (*s*). In consequence of the difficulties which attended the proof of claims resting on prescription at common law, the courts adopted the principle of presuming immemorial possession from a proved possession of twenty years (*t*). This presumption however being liable to be defeated by proof of a commencement of possession prior to the twenty years but within legal memory, a further presumption was adopted by which from the twenty years' possession a lost grant within legal memory was presumed. The difficulties which were found in applying this doctrine, arising in part from differences of judicial opinion as to its true extent, in part from the unwillingness of juries to find in favour of a pure fiction, led to the passing of the Prescription Act (*u*). The doctrine of lost grant was not however thereby abolished, but in cases where neither the statute nor the common law doctrine of prescription are applicable, it is still resorted to, notwithstanding the criticisms that have been urged against it (*x*). The same presumption of legality, but apparently without any definite minimum limit of time, is applied in other cases.

(*r*) *R.* v. *Catesby* (1824) 2 B. & C. 814.

(*s*) *Phillips* v. *Halliday* [1891] A. C. 228, 231.

(*t*) *R.* v. *Joliffe* (1823) 2 B. & C. 54; *Jenkins* v. *Harvey* (1835) 1 C. M. & R. 877.

(*u*) 2 & 3 Will. 4 c. 71. See *Bright* v. *Walker* (1834) 1 C. M. & R. 211, 217; *Mounsey* v. *Ismay*, 3 H. & C. 486, 496.

(*x*) *Dalton* v. *Angus* (1881) 6 App. Cas. at p. 811; *Halliday* v. *Phillips* (1889) 23 Q. B. D. 48; *Bass* v. *Gregory* (1890) 25 Q. B. D. 481. Cf. remarks on the doctrine in *Bryant* v. *Foot* (1867) L. R. 2 Q. B. at p. 181; *S. C.*, L. R. 3 Q. B. at p. 497; and see *Bryant* v. *Lefever* (1879) 4 C. P. D. 172, for the limits of the doctrine.

Thus, where it was necessary to the validity of an award for the closure of a public way in pursuance of statutory powers that it should be made subject to the order and concurrence of magistrates, and the way had been in fact closed for twenty-seven years after the date of the award, the court presumed as a matter of fact that the award had been duly made subject to the order and concurrence required (*y*).

It is presumed that the soil of all navigable rivers where the tide flows and reflows, and of all arms of the sea, and of the foreshore between high and low water marks, belongs *primâ facie* to the Crown (*z*); and that the soil of rivers which do not fall within the above description belongs *primâ facie* to the riparian owners *usque ad medium filum aquæ* (*a*); and a like presumption holds in the case of the owners of the closes abutting upon a road whether public (*b*) or private (*c*). And where properties are divided by a hedge and ditch it is *primâ facie* presumed that both are the property of the person whose land abuts upon the hedge, inasmuch as it is the ordinary practice for the person who makes such a boundary to dig the ditch at the edge of his property and to bank up the excavated soil on his own land (*d*).

The Bills of Exchange Act, 1882, enacts that every holder

(*y*) *Williams* v. *Eyton* (1858) 27 L. J. Ex. 176; 28 L. J. Ex. 146. Cf. *Eliot* v. *Corporation of Bristol* (1895) 72 L. T. 752.

(*z*) Hale, *De Jure Maris*, Pt. I.; *Malcolmson* v. *O'Dea* (1862) 10 H. L. 593; *Gann* v. *Company of Free Fishers of Whitstable* (1864) 35 L. J. C. P. 29.

(*a*) *Bickett* v. *Morris* (1866) L. R. 1 Sc. & D. 47. Cf. *Ecroyd* v. *Coulthard* [1898] 2 Ch. 358.

(*b*) *Berridge* v. *Ward* (1861) 30 L. J. C. P. 218; *Leigh* v. *Jack* (1879) 5 Ex. D. 264; *Pryor* v. *Petre* [1894] 2 Ch. 11. Where there are spaces by the sides of a metalled highway there is no necessary presumption that the highway must extend up to the fences on either side: see *Neeld* v. *Hendon Urban District Council* (1899) 81 L. T. 405; *Belmore* v. *Kent County Council* [1901] 1 Ch. 873; *Offin* v. *Rochford R. D. C.* [1906] 1 Ch. 342.

(*c*) *Holmes* v. *Bellingham* (1859) 29 L. J. C. P. 132.

(*d*) *Vowles* v. *Miller* (1810) 3 Taunt. 137, 138; *Dee* v. *Pearsey* (1827) 7 B. & C. 304, 307.

of a bill is *primâ facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that subsequent to the alleged fraud or illegality value has in good faith been given for the bill (*f*). The same rule applies *mutatis mutandis* to promissory notes (*g*). The provision appears to be substantially an enactment of presumptions which were established at common law. It had been held, for instance, that proof by the defendant that the bill sued on was given for an illegal consideration (*h*), or was negotiated fraudulently by an intermediate holder (*i*), or was stolen (*k*), threw on the plaintiff the burden of proving that he gave value for the bill. It was doubted whether it also threw on him the burden of proving his own *bona fides* (*l*), but this point is now settled by the section. On the other hand it was held at common law that proof of mere want of consideration, as in the case of an accommodation bill (*m*), or a bill given in payment of a wager (*n*), did not throw on the plaintiff the burden of proving value; and in this respect the statute has made no difference.

Another important presumption of law is that with regard to marriage. Wherever two persons have cohabited as man and wife, and have been so reputed, the law presumes that they have been duly married. And when once such cohabitation and reputation have been proved, nothing but strong and cogent evidence will displace the presumption; and the presumption

(*f*) 45 & 46 Vict. c. 61 s. 30.
(*g*) Sect. 89.
(*h*) *Bailey* v. *Bidwell* (1844) 13 M. & W. 73.
(*i*) *Smith* v. *Braine* (1851) 16 Q. B. 244.
(*k*) *Raphael* v. *Bank of England* (1855) 17 C. B. 161.
(*l*) *Jones* v. *Gordon* (1877) 2 App. Cas. 616, 627, 628.
(*m*) *Mills* v. *Barber* (1836) 1 M. & W. 425.
(*n*) *Fitch* v. *Jones* (1855) 5 E. & B. 238.

is all the stronger when these facts on which it is grounded have existed for a long period; and it is still further strengthened whenever a marriage ceremony has been performed between the parties, even though it should appear that the ceremony was in fact invalid and that the parties were aware of it (*o*).

The presumption of legitimacy is this, that a child born of a married woman is deemed to be legitimate, that is, to have been procreated by her husband, and it throws on any person who is interested in making out the illegitimacy the whole burden of proving it (*p*). In order however to prove illegitimacy it is no longer necessary to prove impossibility of access, but only that the husband was not in fact the father of the child (*q*). This must almost always be established by circumstantial evidence, in consequence of the rule which excludes the husband and wife from giving any evidence as to the legitimacy or illegitimacy of the wife's offspring (*r*), although in some cases statements made by her (*s*), and by her paramour (*t*), have been admitted. There is a further presumption in connection with this subject, namely, that when husband and wife are shown to have slept together, they are presumed to have had sexual intercourse; but this presumption, like the former one, can be rebutted by clear circumstantial proof that the husband was not the father of the child (*u*).

The presumption that a particular woman has passed the

(*o*) *Piers* v. *Piers* (1849) 2 H. L. C. 331; *De Thoren* v. *Att.-Gen.* (1876) 1 App. Cas. 686, 690; *Re Shephard* [1904] 1 Ch. 456. As to the forms of testimony which are admissible to prove the facts referred to in the text, see pp. 206—210, 211—220, 286—290.

(*p*) *Morris* v. *Davies* (1836) 5 Cl. & F. 163; *Atchley* v. *Sprigg* (1864) 33 L. J. Ch. 345.

(*q*) *Bosvile* v. *Att.-Gen.* (1887) 12 P. D. 177.

(*r*) *Hawes* v. *Draeger* (1883) 23 Ch. D. 173; *Atchley* v. *Sprigg* (1864) 33 L. J. Ch. 345, 347.

(*s*) *Aylesford Peerage Case* (1885) 11 App. Ca. 1.

(*t*) *Burnaby* v. *Baillie* (1889) 42 Ch. D. 282.

(*u*) *Bosvile* v. *Att.-Gen.* (1887) 12 P. D. 177, 179. In connection with the whole of this paragraph, cp. below, pp. 206—210, 211—220, 286—290.

age of child-bearing is one of fact to be determined partly by the light of general knowledge and partly by the life-history of the person in question. It has several times been held to apply where the age of fifty-three years has been passed, but each case must depend on its particular circumstances (*x*).

The presumptions above mentioned are only a few selected out of many which are of common application in the courts. Almost every chapter of the substantive law may be said to comprise special presumptions appropriate to it; but the detailed discussion of these would be out of place in this treatise. It is otherwise with the important presumptions which are made in connection with documents when given in evidence, but these are dealt with later in Part IV (*y*).

(*x*) *Haynes* v. *Haynes* (1866) 35 L. J. Ch. 303 and *Re White* [1901] 1 Ch. 570, where all the authorities are collected. In *P*—— v. *N*—— W. N. 1896, p. 175, North J. refused to admit evidence as to permanent want of virility in a man of 72.

(*y*) See pp. 372, 374—376, 378; 383—386; 394, 395; 405—406, below.

Part II.

THE RELEVANT FACTS.

CHAPTER I.

THE GENERAL RULE.

§ 1.—*Statement of the Rule.*
§ 2.—*Illustration of the Rule from Possession.*
§ 3.—*Circumstantial Evidence.*
§ 4.—*Identification and Explanation.*

§ 1.—Statement of the Rule.

The general rule is that a party may prove all facts that are relevant to the facts in issue and no others (*a*). The facts in issue are those propositions of fact which by their pleadings, whether written or oral, either party alleges and the other denies. It is not easy to define in a single sentence the meaning of relevancy, but the main conception of the term is this, that the Relevant Facts consist of those facts which form the parts and details of the facts in issue, and such further facts as lead up to or may be necessary to identify or explain them or any part of them. Also all facts which on the other side contradict and displace those facts.

In some cases it happens that the facts in issue are of so simple a character that the details which go to make them up are very few, while in others, where they are more complex, the relevant facts are very numerous. If, for instance, the

(*a*) *Wright* v. *Doe* (1837) 7 A. & E. 313, 384. And see Introduction, pp. 2—5.

facts in issue be the writing and publication of a libel contained in a letter, and the damages recoverable therefor, the relevant facts may be merely that the letter is in the handwriting of the defendant, that it was received and read by the particular person to whom it is alleged to have been published, that it had been dispatched to him by the defendant, and that the plaintiff's reputation has been thereby affected. But if the facts in issue be whether a business sold with a representation as to the amount of its turnover was of the value represented, and, if not, of what value, the relevant facts may consist of a very large number of details ranging over a considerable period of time. In some cases the facts in issue consist of several distinct transactions, but it is more convenient in discussing questions of evidence to assume that they consist of one only. Such transaction however may consist of a series of acts, one following the other at a considerable interval of time as, for example, in an action for damages for breach of contract, (i) the contract, (ii) the breach, (iii) the subsequent damage, or, in a prosecution for obtaining money by false pretences, (i) the representation, (ii) the transaction induced by it, (iii) the consequent loss afterwards discovered.

The distinction between the facts in issue and facts which are relevant to the issue is incidentally displayed in two rules of pleading and procedure. It is a rule of pleading, where by the practice of the court the facts in issue must be reduced into written forms, that evidence shall not be pleaded. And there is a converse rule in the adduction of evidence, that a witness may not be asked the question in issue, since that is for the jury; he may only be asked as to the details of fact from which the jury are to draw the general conclusion. It is not possible to define with exact precision the degree of generality permissible in pleadings (*b*), nor the

(*b*) For the principal rules of pleading in the High Court see Order XIX rr. 4, 6, 15, 20, 22—24; *Blake* v. *Albion Life Ass. Soc.* (1876) 45 L. J. C. P. 667; *Phillips* v. *Phillips* (1878) 4 Q. B. D. 127.

degree of particularity which must be observed in presenting the items of evidence, since they vary to some extent according to the circumstances of the case; but this qualification does not affect the validity of this broad distinction between the facts in issue and the relevant facts.

§ 2.—Illustration of the Rule from Possession.

The general rule is well illustrated by cases of possession, and especially by the possession of real rights, whether incorporeal, as an ancient watercourse or a right of common, or corporeal, as a field or a road strip. In such cases every act of enjoyment or possession is a relevant fact, since the right claimed is constituted by an indefinite number of acts of user exercised *animo domini*. But inasmuch as such acts are more or less discontinuous in their character—and in the case of ancient rights the evidence of them is by lapse of time rendered even more so—the question for the jury is whether the acts proved are so numerous and so connected that the right of possession may be inferred from them. If they are so frequent and of such a character as to indicate that they were the exercise of one continuous open claim at all times when it would be natural for the person claiming it to exercise it, the jury will ordinarily infer the general right, inasmuch as the mere discontinuity of the evidence is not in itself any ground of suspicion. The acts of enjoyment from which the ownership of real property may be inferred are very various, as for instance, the cutting of timber (*c*), the repairing of fences or banks (*d*), the perambulation of boundaries of a manor or parish (*e*), the taking of wreck on the foreshore (*f*), and the granting to others of licences (*g*) or

(*c*) *Stanley* v. *White* (1811) 14 East, 332.

(*d*) *Jones* v. *Williams* (1837) 2 M. & W. 326. Cf. p. 81 below.

(*e*) *Weeks* v. *Sparke* (1813) 1 M. & S. 679, 689; *Woolway* v. *Rowe* (1834) 1 A. & E. 114; and see below, pp. 227, 231.

(*f*) *Att.-Gen.* v. *Emerson* [1891] A. C. 649, 660.

(*g*) *Rogers* v. *Allen* (1808) 1 Camp. 309.

leases (*h*) under which possession is taken and held; also the receipt of rents from tenants of the property (*i*); for all these acts are fractions of that sum total of enjoyment which characterises *dominium*. And successful claims to exercise possessory rights are equally relevant facts when they are exercised through the intervention either of customary courts or of the courts of the land. Thus, where the issue was as to the existence of a custom within a manor for the lord to have a heriot on the death of each of his freehold tenants, presentments of the deaths of manorial tenants, and of the consequent payment of heriots to the lord, were admitted in evidence to prove the custom (*j*). So, on an issue as to the terms on which customary tenants within a manor were entitled to obtain renewals of leases, presentments of such renewals and of the fines paid thereon were admitted as relevant (*k*). In like manner it has been held that verdicts, judgments and settlements in actions of trespass to hereditaments (*l*), convictions for the non-repair of public ways (*m*), and verdicts and judgments for the recovery of prescriptive tolls (*n*), are admissible as relevant facts when the right to the land, the way, or the toll respectively is in question. Adjudications of this kind are referred to again in the chapter on Reputation in Part III (*o*).

(*h*) *Bristow* v. *Cormican* (1878) 3 App. Ca. 641; *Att.-Gen.* v. *Emerson* [1891] A. C. 649, 657—660.

(*i*) *Malcolmson* v. *O'Dea* (1862) 10 H. L. 593.

(*j*) *Damerell* v. *Protheroe* (1847) 10 Q. B. 20.

(*k*) *Freeman* v. *Phillips* (1816) 4 M. & S. 486.

(*l*) *Rogers* v. *Allen* (1808) 1 Camp. 309; *Neill* v. *Devonshire* (1882) 8 App. Ca. 135; *Blandy-Jenkins* v. *Dunraven* [1899] 2 Ch. 121.

(*m*) *R.* v. *Brightside Bierlow* (1849) 13 Q. B. 933.

(*n*) *City of London* v. *Clarke* (1691) Carth. 181; *Laybourn* v. *Crisp* (1838) 4 M. & W. 320.

(*o*) See pp. 232—234. Acts of possession before the time of living memory are frequently provable by the media of proof known as Declarations in the Course of Duty and Declarations against Interest which form the subject of Chapters III and IV of Part III.

§ 3.—Circumstantial Evidence.

Relevant facts are sometimes divided somewhat loosely into two classes, direct evidence and circumstantial, according as the relation of the relevant facts to the facts in issue is more or less proximate or remote. When every part of a fact in issue is presented to the cognizance of the court by means of the statements of those who witnessed it, the evidence is said to be direct. The only question for the jury is whether the statements are accurate. If they are, no further inference has to be drawn, for the transaction has been presented to the court in all its completeness just as it happened. If, on the other hand, there is no evidence available of any person who witnessed the fact in issue, it may still be possible to prove a number of facts which though not exactly constituting the fact in issue, are so closely connected with it that it is reasonable to infer from their existence the existence of the fact in issue. Such facts are called circumstantial evidence, as if they formed not so much a part of the central fact in issue as the surrounding fringe and incidents of it (*p*). Circumstantial evidence is resorted to either by reason of the lack of direct evidence to prove the facts in issue or some part of them, or to supplement and corroborate direct evidence when doubt is attempted to be cast upon it.

The want of direct evidence is often illustrated by criminal cases. Thus a man is found slain, suspicion attaches to one of his neighbours, and the suspected man is put on his trial for murder. No one beheld the deed, save the man who is now dead, and the man, whoever he was, who slew him. The deceased made no statement about it to

(*p*) The term Direct Evidence is also used, in opposition to the term Hearsay, to denote the evidence of an eye-witness delivered by himself on oath in Court, as opposed to evidence of his Declarations tendered as proof after his death, and other forms of Hearsay. See pp. 6, 121 *seq.*, 142 *seq.* These two senses of the term should be carefully distinguished.

any living person, and the prisoner has disclosed nothing. Here the act of murder, which is the fact in issue, cannot be proved by direct evidence; it must be proved, if at all, by inference from other facts. The prosecution will be entitled to prove as relevant all facts which may tend to show that the prisoner had a motive for the murder, that he expressed an intention to commit it, that he made preparation, and that he had opportunity (*q*); and, conversely, any facts which tend to disprove any of these circumstances, or to explain them in prisoner's favour, will in like manner be relevant.

The other ground for resorting to circumstantial evidence is illustrated daily in the courts. It is brought into full play when witnesses are called on both sides, and each party throws doubt upon material portions of the evidence adduced by his opponent. In such case the minor circumstances of the transaction in question may become just as relevant as in those cases where there is hardly any direct evidence at all as to the facts in issue. Thus, in an action for money lent, where the defence was a denial of the loan, the defendant tendered evidence as to the pecuniary circumstances of the plaintiff during the seven years preceding the date of the alleged loan. He proved that the plaintiff neither had any property of his own, nor had taken any benefit under his father's will, that he had been a labourer at one shilling a day, and that his means of livelihood were very precarious; and it was held by the full court that the evidence had been rightly admitted as circumstantial evidence in support of the negative of the issue (*r*).

In one class of cases circumstantial evidence must from the nature of the case be given. They are those where

(*q*) The circumstances of his subsequent conduct, tending to show a sense of guilt, are also admissible, but belong to the head of Admissions. See pp. 152—158. Circumstantial relevant facts and circumstantial admissions (commonly termed admissions by conduct), together make up the great bulk of what is called circumstantial evidence. Cf. p. 158 below.

(*r*) *Dowling* v. *Dowling* (1860) 10 Ir. C. L. R. 236.

the state of mind of a particular person is in issue, as, for instance, where it is alleged that a party did a particular act with a fraudulent purpose, or where, to establish the commission of a particular crime, it is necessary to prove that the prisoner, when he committed the physical act, did so with some particular guilty intent. In these cases no one save the party charged can, strictly speaking, give direct evidence of his mental state; and, when he denies the charge, it has to be proved by inference from his conduct (*s*).

Circumstantial evidence is not confined to the proof of a fact in issue. Generally, any fact which is relevant to the issue may be proved by circumstantial evidence. But the series of subordinate inquiries thus logically admissible is subject in practice to reasonable limitations. The line is drawn where the extent of the inquiry becomes wholly disproportionate to the importance of the fact to be proved (*t*).

§ 4.—Identification and Explanation.

Facts which are not otherwise relevant to the issue are admissible when they can be shown to be, for the particular purpose in hand, identical with some relevant fact. Thus, where the issue was as to the line of boundary of a particular estate, evidence having been given that the estate was conterminous with a certain hamlet, evidence was admitted to prove the boundary of the hamlet (*u*). So, where the date of a particular event was in question, and a witness deposed that, although he could not state the date, he knew that it was contemporaneous with a marriage between A and B, evidence was admitted to show on what date A and B were married (*x*).

(*s*) See pp. 73—79; 345—350.

(*t*) The whole subject of circumstantial evidence is analysed and illustrated in the work referred to above, p. 44, note (*c*).

(*u*) *Thomas* v. *Jenkins* (1837) 6 A. & E. 525.

(*x*) *Doe* v. *Barnes* (1834) 1 M. & R. 386.

It is on a similar principle that documents not otherwise relevant to the issue are admissible for the purpose of comparison of handwriting when proved to be in the handwriting of the party whose signature is in question (*y*).

In like manner any fact which is necessary in order to explain any fact in issue or any relevant fact, is itself relevant; and it not infrequently happens that for this purpose a large number of facts become relevant, where an issue is raised as to the character or quality of some particular person or thing. This head of evidence may be said to bear some analogy to that which is admitted for the purpose of interpreting documents by clearing up a latent ambiguity (*z*).

(*y*) *Birch* v. *Ridgway* (1858) 1 F. & F. 270. Cf. pp. 370, 371.
(*z*) See pp. 106—113.

CHAPTER II.

SIMILAR FACTS.

§ 1.—*Scope of the Rule.*
§ 2.—*Illustrations of Exclusion of Similar Facts.*
§ 3.—*Similar Facts forming one Transaction or Course of Dealing with the Facts in Issue.*
§ 4.—*Similar Facts admissible to prove Guilty Knowledge or Intention.*
§ 5.—*Similar Facts within a District having a Common Character.*

§ 1.—Scope of the Rule.

Whether the evidence be direct or circumstantial, it must be confined to the facts in issue. To admit evidence of other transactions which, although resembling that in issue, are not connected with it, has always been held to be a violation of the general principle which excludes irrelevant facts. The principle on which such evidence is rejected is not that of *res inter alios acta;* it applies equally where the similar facts consist of transactions *inter partes.* And it probably owes its origin both to the difficulty of reasoning with certainty from mere analogy and to the desire to avoid undue prolixity in judicial inquiries.

On the other hand transactions similar to that in issue may be given in evidence for the purpose of proving the latter, when it can be shown that they are so connected as to be relevant to each other. It is difficult to give any general definition of the connection necessary to render such evidence admissible, but it will be found on examination of the cases that they may be classed roughly under three heads, namely :

(i) cases where the facts in issue and the similar facts

sought to be given in evidence are so intermixed that they form in fact one transaction only, and might be so described without departing from the ordinary use of language; or where the facts in issue and the other similar facts consist of a series of acts done in pursuance of some one design, scheme or system so as to form a virtually continuous course of dealing or conduct.

(ii) cases where a party is charged with the commission of some tort or crime which involves guilty knowledge or intention, one of the facts in issue being whether the physical act done was committed by him with the guilty knowledge or intention alleged. In such cases evidence of similar acts committed by the party is admissible for the purpose of showing from the frequency of such acts that on the occasion in question he must have acted with design and not inadvertently. This class of cases bears a very close resemblance to the last, though the difference is sufficient to make separate classification desirable for the sake of clearness.

(iii) cases where the facts in issue and the other similar facts sought to be proved form parts of one larger whole which possesses one common character in all its parts, so that what is true of one part of it will be true of the other parts of it: such whole may consist, for example, of some physical area or unit, such as a district, manor, waste, field, river, road, or boundary, regarded as the subject of some right or custom common to all its parts, although only one particular portion of it may form the subject of the dispute.

This definition and division of the subject can be best appreciated by the aid of the illustrations given in the following sections of this chapter.

§ 2.—Illustrations of Exclusion of Similar Facts.

A leading civil case on this point is *Hollingham* v. *Head* (*a*). It was an action for the price of guano sold and delivered by the plaintiff to the defendant; and the defence was that the plaintiff had sold the guano on the terms that it was not to be paid for unless equal to Peruvian guano, which the defendant alleged it was not. The defendant, in order to prove that the plaintiff had contracted with him on these terms, tendered evidence to show that the plaintiff had sold other parcels of the same guano to other persons on that particular condition. This evidence was rejected, and the court upheld the rejection of the evidence. Willes J. said (*b*) :—

> It is not easy in all cases to draw the line, and to define with accuracy where probability ceases and speculation begins: but we are bound to lay down the rule to the best of our ability. No doubt, the rule as to confining the evidence to that which is relevant and pertinent to the issue is one of great importance, not only as regards the particular case, but also with reference to saving the time of the court, and preventing the minds of the jury from being drawn away from the real point they have to decide. . . . Now, it appears to me that the evidence proposed to be given in this case, if admitted, would not have shown that it was more probable that the contract was subject to the condition insisted upon by the defendant. The question may be put thus—Does the fact of a person having once or many times in his life done a particular act in a particular way make it more probable that he has done the same thing in the same way upon another and different occasion? To admit such speculative evidence would, I think, be fraught with great danger. . . . If such evidence were held admissible it would be difficult to say that the defendant might not in any case, where the question was, whether or not there had been a sale of goods on credit, call witnesses to prove that the plaintiff had dealt with other persons upon a certain credit; or, in an action for an assault, that the plaintiff might not give evidence of former assaults committed by the defendant upon other persons, or upon other persons of a particular class, for the purpose of showing that he was a quarrelsome individual, and therefore that it was highly probable that the particular charge of assault was well founded. The extent to which

(*a*) (1858) 4 C. B. N. S. 388.
(*b*) *Ibid.* p. 391.

this sort of thing might be carried is inconceivable (*c*). . . . To obviate the prejudice, the injustice, and the waste of time to which the admission of such evidence would lead, and bearing in mind the extent to which it might be carried, and that litigants are mortal, it is necessary not only to adhere to the rule, but to lay it down strictly. I think, therefore, the fact that the plaintiff had entered into contracts of a particular kind with other persons on other occasions could not properly be admitted in evidence, where no custom of trade to make such contracts, and no connection between such and the one in question, was shown to exist.

In another case, where the issue between the parties was whether certain land was acquired by the defendant and one C as partners, it was held to be irrelevant to the issue to prove that at other times, both before and after the transaction in question, the parties had acquired other pieces of land as partners (*d*).

So in a penal action for usury alleged to have been committed in a contract between the defendant and the Marquis de Chambonas, the plaintiff called the Marquis to prove the usury, namely, a loan by the defendant to the witness at 120 per cent. per annum. The defence was that it was no loan, but a partnership transaction; and the defendant, in order to lay a foundation for giving evidence of other partnership transactions in which he alleged the Marquis had been engaged, and from which the character of the transaction in question might be inferred, proposed to cross-examine the Marquis as to them. The evidence, however, was disallowed as irrelevant, and its rejection was upheld by the court. It was held that it could only have been relevant had the witness first admitted that such other contracts were made in similar terms to that with the defendant (*e*). So in an action against a married woman for goods sold and delivered, where the question was whether the defendant had falsely represented to the plaintiff that she was a *feme sole*, it

(*c*) For what follows, see the report in 27 L. J. C. P. p. 242.
(*d*) *Kennedy* v. *Dodson* [1895] 1 Ch. 334.
(*e*) *Spenceley* v. *De Willott* (1806) 7 East, 108.

was held by Parke B. that the plaintiff could not give evidence of the defendant having made such representations to other tradesmen, unless they were so made as to come to the plaintiff's knowledge (*f*).

Again, where the question was whether the defendant's alleged acceptance of a bill of exchange was, as he contended, forged, it was held that he could not give in evidence that the plaintiff had in his possession, and had circulated, a number of other bills with forged acceptances of the defendant, unless it was first shown that this bill had formed part of the collection (*g*). And in an action for assault to the plaintiff's wife, where the defendant on cross-examination denied that he had assaulted other women in a like manner, it was held that this evidence was not relevant to the issue, so as to entitle the defendant to call witnesses to rebut, or the plaintiff to call witnesses to substantiate, the imputations thus made (*h*). So it is well established that apart from some special connection (*i*) the customs of one manor are not admissible to prove or explain the customs of another. In the leading case of *Anglesey* v. *Hatherton* (*k*) the question was whether certain customary tenants of a manor had a right by immemorial custom to dig for coal under their tenements; in support of the custom evidence was tendered of the existence of a like custom in an adjoining manor within the same parish and leet; and an attempt was further made, though unsuccessfully, to show that the manor in question had formerly formed one with the adjoining manor. It was however held that the evidence was not admissible, and that the subinfeudation if established would not have justified its admission unless it

(*f*) *Barden* v. *Keverberg* (1836) 2 M. & W. 61, 63, 64.

(*g*) *Griffits* v. *Payne* (1839) 11 A. & E. 131; cp. *Viney* v. *Barss* (1795) 1 Esp. 292.

(*h*) *Tolman* v. *Johnstone* (1860) 2 F. & F. 66.

(*i*) *Somerset* v. *France* (1725) 1 Str. per Reynolds J. at p. 662; *Roe* v. *Parker* (1792) 5 T. R. 26, per Kenyon C. J. at p. 30.

(*k*) *Anglesey* v. *Hatherton* (1842) 10 M. & W. 218.

could be shown to have taken place after the time when the customs could lawfully have originated.

The rule is equally strict in criminal cases.

It is an elementary principle of criminal law that a prisoner can only be convicted on a criminal charge by evidence bearing directly on that charge, and that it is inadmissible to endeavour to support the charge by showing that the prisoner has committed other similar offences, and is therefore likely to have committed the one with which he is charged(*l*).

Such evidence merely tends to show that the accused has a propensity to commit a certain kind of crime or to commit crimes generally. And it is of course immaterial by what form of testimony such evidence is tendered; the prisoner's own admission could not be given in evidence against him any more than the testimony of witnesses. Thus on a prosecution for the theft of a shilling, the property of one Spencer, the prosecutor tendered evidence to show that when the shilling, which had been previously marked, was found on the prisoner, he was asked by the constable who arrested him if he had any more money of Mr. Spencer's about him, and that the prisoner thereupon produced some half-crowns, and made a statement in regard to them. There was apparently nothing to show that the shilling and half-crowns were taken at the same time. The evidence was objected to as tending to prove a distinct felony from that charged, and the objection was upheld (*m*).

§ 3.—Similar Facts forming one Transaction or Course of Dealing with the Facts in Issue.

The best illustrations of this class are drawn from the criminal law, though it is no less applicable in civil cases.

A shopman was indicted for stealing from his master's till

(*l*) Per Channell J., in *R.* v. *Ollis* [1900] 2 Q. B. at p. 781.
(*m*) *R.* v. *Butler* (1846) 2 C. & K. 221.

the sum of six shillings. The evidence was that the money had been taken in several distinct takings in the course of the same day, and objection was made to the admission of evidence of any takings after the first, but was overruled. Bayley J. said:

> Generally speaking it is not competent to a prosecutor to prove a man guilty of one felony, by proving him guilty of another unconnected felony; but where several felonies are connected together, and form part of one entire transaction, then the one is evidence to show the character of the other (*n*).

In another case there were three indictments against a prisoner for firing three separate ricks. They were all set on fire one immediately after the other and were within sight of each other. Upon the trial of the first indictment the evidence of an accomplice was admitted as to all three burnings, as all constituting parts of the same transaction, and on the same ground a confession relating to all three was also admitted (*o*). In *R.* v. *Bleasdale* (*p*) the prisoner was indicted for stealing coal belonging to over thirty different persons for a period of over four years, he having worked the same without their knowledge and removed it through his own mine and shaft. Erle J. declined to rule that each severance and removal was a separate transaction (*q*) and for the sake of convenience only directed the counsel to address himself to the charge of stealing the coal of one of the proprietors (*r*). On an indictment against three prisoners for breaking into a station-house of the Midland Railway Company it appeared that two only of the prisoners had in their possession property taken from the station, but evidence

(*n*) *R.* v. *Ellis* (1826) 6 B. & C. 145 at p. 147; cf. *R.* v. *Mansfield* (1841) Car. & M. 140.

(*o*) *R.* v. *Long* (1833) 6 C. & P. 179.

(*p*) 2 C. & K. 765.

(*q*) He appears to have taken the view that the whole taking was one act: see per Bovill C. J. in *R.* v. *Firth* (1869) L. R. 1 C. C. R. at p. 175.

(*r*) At the same time he admitted the evidence of all the other takings on the issue of felonious intention. As to this, see p. 73 *seq.*

was tendered to show that three other station-houses on the company's line had been broken into on the same night, some of the property taken from which was found on the third prisoner; also that house-breaking implements corresponding to marks on the station-houses were found on them all. Bramwell B. admitted evidence of all three burglaries on the ground that they tended to explain each other and were so intermixed that they could not be separated (*s*). In *R.* v. *Firth* (*t*) the prisoner was indicted for stealing gas from the Corporation of Halifax on the 30th of April, 1866. The gas had been taken by means of a pipe which connected the main with the prisoner's manufactory without passing through a meter. The pipe was never closed at its junction with the meter and consequently always remained full of gas. The gas had been taken in this manner for a number of years. The Court held that there was one continuous taking of the gas over the whole period, and that even if there had been a closing of the branch pipe every day their judgment would have been the same (*u*).

§ 4.—Similar Facts admissible to prove Guilty Knowledge or Intention.

This head of cases, as already stated, bears a very close resemblance to the last (*x*).

In an action against a life insurance society to recover a sum of money proved to have been obtained by them from

(*s*) *R.* v. *Cobden and others*, 3 F. & F. 833.

(*t*) L. R. 1 C. C. R. 172.

(*u*) And see other illustrations of the rule given in the judgment at p. 176. Cf. *Ex parte Burnby* [1901] 2 K. B. 458. There an information was objected to as bad for duplicity. It charged the defendant with permitting his public-house to be used as a brothel on eight specified days in January and February, 1901, but the days were not continuous. It was held that the information correctly charged one continuous offence.

(*x*) For statement of the principle, see *R.* v. *Richardson* (1860) 2 F. & F. 343; *R.* v. *Harris* (1864) 4 F. & F. 342.

the plaintiff, and alleged by the plaintiff to have been so obtained through a fraud of the defendants' agent committed with their knowledge and for their benefit, it was held that evidence of similar frauds committed on other persons than the plaintiff by the same agent and in the same manner, with the knowledge and for the benefit of the defendants, was admissible in support of the plaintiff's allegation of fraud (*y*). The same principle has been applied in actions of libel and slander in which evidence is admitted of other defamatory words published either before or after the defamation in question, in order to prove, on the issue as to amount of the damages, the malicious spirit and intention of the publication (*z*). In criminal cases such evidence is most common in prosecutions for knowingly uttering forged documents (*a*) and counterfeit coin (*b*); but it is also frequently applied in other cases, as false pretences (*c*), embezzlement (*d*),

(*y*) *Blake* v. *Albion Life Assurance Society* (1878) 4 C. P. D. 94. Cf. *Barnes* v. *Merritt & Co.* (1899) 15 T. L. R. 419. That was an action upon a contract to pay for an advertisement. The defence was that the contract had been procured by misrepresentation and the defendants further alleged that the misrepresentation was part of a systematic fraud, and tendered evidence of other merchants who had been similarly deceived. The judge at the trial rejected this evidence and the jury found for the plaintiffs for the full amount. The Court of Appeal ordered a new trial on the ground of the rejection of the evidence. It would seem that the evidence was admissible both as relevant to the issue raised that the fraud was systematic and also on the issue that the misrepresentation was fraudulent. And although not admissible on the issue whether there had been in fact a misrepresentation, had that issue stood alone, the defendants were held entitled to lay all their evidence on all the issues before the jury instead of the case being tried in separate stages.

(*z*) *Pearson* v. *Lemaitre* (1843) 5 M. & G. 700; *Rustell* v. *Macquister* (1807) 1 Camp. 48, note.

(*a*) *R.* v. *Wylie* (1804) 1 Bos. & P. N. R. 92; *R.* v. *Ball* (1808) 1 Camp. 324.

(*b*) *R.* v. *Forster* (1855) 6 Cox, 521. Cases like *R.* v. *Jarvis* (1855) 25 L. J. M. C. 30, where evidence is admitted of a quantity of other false coin found in the prisoner's possession, can be justified not only on this principle, but also on the ground that these facts are inseparable from the proof of the transaction.

(*c*) *R.* v. *Francis* (1874) L. R. 2 C. C. R. 128, 132; *R.* v. *Ollis* [1900] 2 Q. B. 758.

(*d*) *R.* v. *Richardson* (1860) 2 F. & F. 343.

arson (*e*), malicious injury (*f*), and murder (*g*). In *R.* v. *Geering* (*g*) the prisoner Mary Ann Geering was indicted for the murder in September 1848 of her husband Richard Geering by the administration of arsenic. It would appear that evidence was given tending to show that the deceased had died of arsenical poisoning, and also that the prisoner had lived with him and had generally made tea for him, cooked his victuals, and supplied him with food on his leaving his home to go to work in the morning. The prosecution also tendered evidence to show that the prisoner's three sons, George, James, and Benjamin, had in like manner lived with the prisoner, and had been provided for by her; and that in December 1848 George, and in March 1849 James, had died from arsenical poisoning, and in April 1849 Benjamin had been rendered very ill from the same cause. These other cases formed the subject of three other indictments. On the part of the defence this evidence was objected to, but Pollock C. B. held that it was admissible as tending to prove that the death of the husband was occasioned by arsenic and was relevant to the question whether the taking was accidental or not, and his ruling was subsequently approved by Alderson B. and Talfourd J. (*h*).

In the later case of *Makin* v. *The A.-G. for New South Wales* (*i*) the rule in question came under consideration.

(*e*) *R.* v. *Gray* (1866) 4 F. & F. 1102.

(*f*) *R.* v. *Voke* (1823) R. & R. 531.

(*g*) *R.* v. *Geering* (1849) 18 L. J. M. C. 215; cp. *R.* v. *Garner* (1863) 3 F. & F. 681; *R.* v. *Cotton* (1873) 12 Cox, 400; *R.* v. *Heeson* (1878) 14 Cox, 40; *Makin* v. *A.-G. for New South Wales* [1894] A. C. 57.

(*h*) See *Makin* v. *A.-G. for New South Wales* [1894] A. C. at pp. 65, 66; *R.* v. *Geering* has been constantly cited as a leading decision. One notable case in which it was followed was that of *R.* v. *Neill*. Dr. Neill was indicted for the murder of a girl, with whom he had been intimate, by poisoning her with strychnine; and evidence was received that three other women had died from the effects of strychnine after being intimate with him, and that he had attempted to poison a fourth. *Reg.* v. *Neill* or *Cream*, Times, Oct. 18th *seq.* 1892.

(*i*) [1894] App. Cas. 57.

Makin and his wife were tried at Darlinghurst in New South Wales for the murder of an infant child whose body was found buried in the back-yard of a house where the prisoners had lived. They had represented to the mother that they were willing to take the child upon payment of a small premium of £3 as they desired to adopt it, having lost a child of their own. At the inquest the prisoners alleged that they had received only one child to nurse and had given it back to the parents. Evidence was admitted at the trial to prove that several other infants were received from their mothers by the prisoners on similar representations and upon payment of a sum inadequate for their support for more than a very limited period; and that the bodies of some twelve other infants had been found buried in a similar manner in the gardens or back-yards of houses where the prisoners had successively lived. The prisoners were convicted, but sentence was deferred until after argument of a special case as to whether such evidence was rightly admitted. The prisoners having been held guilty petitioned for leave to appeal to the Judicial Committee of the Privy Council, who held that the evidence was relevant to the issue to be tried by the jury and the Lord Chancellor in delivering judgment stated the rules in these words:—

> It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused (*j*).

Although it is clear from the authorities that a distinction

(*j*) At p. 65.

in terms is drawn between this class of cases and the last (*k*), it will be found on examining the reported decisions that they run very closely into one another. And indeed it is obvious that that which constitutes the most cogent form of evidence under this head, namely a considerable number of proved instances of conduct like that charged, must inevitably present the appearance of a system or regular course of dealing. And herein seems to lie the answer to some of the difficulties that have been raised as to this head of evidence. It has for instance been debated whether it is permissible, in order to prove guilty knowledge or intention, to give in evidence similar acts subsequent to that charged. It would seem unreasonable to prove that a prisoner had on one other occasion only, and that subsequent to the date of the act charged, performed a similar act; whereas if the circumstances are such as to present the appearance of a continuous course of dealing, and especially if that course of dealing has been both previous and subsequent to the act charged, so that the whole may be regarded as virtually one transaction, it seems reasonable to admit the evidence. It was on this view apparently that the judges upheld the conviction in the case of *R.* v. *Rhodes* (*l*), a case where the prisoner was indicted for obtaining eggs on credit from the prosecutor by means of an advertisement in which he held himself out as carrying on the business of farmer and dairyman, which business was in fact a sham and pretence. Evidence was admitted of two subsequent cases where persons had been cheated in a similar way, subsequently to the deception of the prosecutor, by means of the same advertisement (*m*). It is important in such cases to regard not merely the allegation put forward in the pleading,

(*k*) See *R.* v. *Voke* (1823) R. & R. 531 at p. 533; and other cases cited in this section.

(*l*) [1899] 1 Q. B. 77.

(*m*) For cases of admission of evidence of subsequent acts see *R.* v. *Forster* (1855) 6 Cox, 521; *R.* v. *Richardson* (1860) 2 F. & F. 343.

but the case sought to be made at the trial with a view to establishing it; if the fraud alleged in the pleadings is sought to be made out at the trial by the proof of systematic dishonest dealing the party alleging it is entitled to give evidence of other instances in support of it (*n*).

Again, it has been suggested that evidence of this class does not become admissible until the commission of the physical act, the intention of which is in issue, has been proved (*o*). If this means that the evidence should be reserved until a *primâ facie* case of commission of the physical act has been proved, the proposition seems sound enough as a general rule; but it would not justify the judge in either a civil or criminal case in dividing the trial into two stages (*p*).

The fact that the similar acts are themselves indictable offences (*q*) and the subject of separate indictments (*r*) makes no difference to their admissibility. And even if the party has been acquitted in respect of them, they may still be given in evidence (*s*). On the other hand the conduct from which the guilty knowledge or intention is to be inferred ought to be of the same character as that which is the subject of the inquiry; and on this ground, in prosecutions for receiving goods knowing them to have been stolen, it was held that evidence was not admissible to prove that other stolen property was found in the prisoner's possession, if there was no evidence that he had received such property from the persons who had stolen it (*t*). In order however

(*n*) *R.* v. *Rhodes* [1899] 1 Q. B. 77; and *Barnes* v. *Merritt & Co.* (1899) 15 T. L. R. 419.

(*o*) *R.* v. *Francis* (1874) L. R. 2 C. C. 128, 131; *Blake* v. *Albion Life Assurance Society* (1876) 45 L. J. C. P. 663, 666.

(*p*) *Barnes* v. *Merritt & Co.* (1899) 15 T. L. R. 419.

(*q*) *R.* v. *Richardson* (1860) 2 F. & F. 343.

(*r*) *R.* v. *Long* (1833) 6 C. & P. 179.

(*s*) *R.* v. *Ollis* [1900] 2 Q. B. 758.

(*t*) *R.* v. *Oddy* (1851) 2 Den. C. C. 264.

to enable such evidence of mere finding to be given in evidence in certain cases, it has been provided by sect. 19 of the Prevention of Crime Act, 34 & 35 Vict. c. 112, that—

> Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceedings taken against him.

The words "found in the possession of such person" have been the subject of judicial construction. It has been held that this enactment has no application unless the other stolen property is found in the prisoner's possession at or about the time of the finding of the property which is the subject of the indictment (*u*). Nor has it any application if the prisoner has parted with it before the date of the stealing of the property for the receiving of which he is indicted (*x*).

The same section also contains this further enactment with regard to the admission of evidence of conduct on other occasions than that in question :—

> Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then, if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen; provided that not less than seven days' notice in writing shall have been given to the person accused that proof is intended to be given of such previous conviction; and it shall not be necessary for the purposes of this section to charge in the indictment the previous conviction of the person so accused.

(*u*) *R.* v. *Drage* (1878) 14 Cox, 85.
(*x*) *R.* v. *Carter* (1884) 12 Q. B. D. 522.

§ 5. Similar Facts within a District having a Common Character.

It has been stated above (*x*), that where the facts in issue involve the ascertainment of the customs of a manor, the customs of other manors are not ordinarily admissible to prove or explain it. But the case is otherwise where it can be shown that the customs of all the manors are for some reason identical, as in the case of certain manors on the borders of England and Scotland which are all subject to a well-known custom called tenant-right (*y*). So in *Rowe* v. *Brenton* (*z*), where the defendant a lessee of mines from the Duchy of Cornwall justified taking minerals from under the adjoining lands of the plaintiff, a "conventionary tenant" of the manor of Tewington in the Duchy, on the ground that such tenants had no right to the minerals under their tenements, evidence was admitted, after argument, as to the special rights which distinguished "conventionary tenants" in seventeen other manors held of the Duchy. In like manner—where two trades can be shown to be so connected as to be virtually one, the customs of the one branch may become admissible to explain those of the other (*a*).

The rule as applied to rights of property or possession is well stated by Bayley J. (*b*) :—

> When once it has been established that the *locus in quo* is part of one entire district honor or manor, it is competent to give in evidence acts done on other parts of that district honor or manor, in order to show a right to the *locus in quo*.

A leading case on this point is *Jones* v. *Williams* (*c*). There the plaintiff sued the defendant for trespass to the bed

(*x*) See pp. 70, 71.

(*y*) *Somerset* v. *France* (1725) 1 Str. 662; *Anglesey* v. *Hatherton* (1842) 10 M. & W. 218 at pp. 237, 246.

(*z*) (1828) 8 B. & C. 737; referred to in *Anglesey* v. *Hatherton* at p. 237.

(*a*) *Fleet* v. *Murton* (1871) L. R. 7 Q. B. 126, 134.

(*b*) In *Tyrwhit* v. *Wynne* (1819) 2 B. & Ald. 554 at p. 561.

(*c*) (1837) 2 M. & W. 326. And cf. p. 60.

of a stream which divided their respective farms. The plaintiff claimed the entire bed. The defence was that the defendant was the owner of the stream *usque ad medium filum* from his side, which, if true, would have entitled him to commit the acts complained of. The plaintiff's farm extended along the stream not only for the whole length of the defendant's farm, but also beyond it and opposite to another farm adjoining the defendant's. The plaintiff tendered in evidence repairs and other acts of ownership exercised upon the whole bed and the banks of the stream alongside the farm beyond the defendant's, and upon a fence which was a continuation of the fence which divided the defendant's farm from the stream. The evidence was objected to and rejected, and a verdict was found in favour of the defendant. But on an application by the plaintiff for a new trial, the court held that it should have been admitted. Parke B. said :—

I think the evidence offered of acts in another part of one continuous hedge, and in the whole bed of the river, adjoining the plaintiff's land, were admissible in evidence, on the ground that they are such acts as might reasonably lead to the inference that the entire hedge and bed of the river, and consequently the part in dispute, belonged to the plaintiff. Ownership may be proved by proof of possession, and that can be shown only by acts of enjoyment of the land itself; but it is impossible, in the nature of things, to confine the evidence to the very precise spot on which the alleged trespass may have been committed; evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff if the other parts did. In ordinary cases, to prove his title to a close, the claimant may give in evidence acts of ownership in any part of the same inclosure; for the ownership of one part causes a reasonable inference that the other belongs to the same person; though it by no means follows as a necessary consequence; for different persons may have balks of land in the same enclosure; but this is a fact to be submitted to the jury. So I apprehend the same rule is applicable to a wood which is not inclosed by any fence; if you prove the cutting of timber in one part, I take that to be evidence to go to a jury to prove a right in the whole wood, although there be no fence or distinct boundary surrounding the whole; and the case of *Stanley* v. *White* (*d*), I con-

(*d*) (1811) 14 East, 332.

ceive, is to be explained on this principle: there was a continuous belt of trees, and acts of ownership on one part were held to be admissible to prove that the plaintiff was the owner of another part on which the trespass was committed. So I should apply the same reasoning to a continuous hedge, though no doubt the defendant might rebut the inference that the whole belonged to the same person by showing acts of ownership on his part along the same fence.

In another case the question was whether certain strips of land along the roadside belonged as waste land to the owner of the adjoining enclosure, or were the property of the lord of the manor. The lord, who was the defendant in the action, tendered evidence of acts of ownership exercised by him from time to time on several similar strips of land in various parts of the manor. Three of these strips lay alongside a continuation of the road on which lay the strip in question, about two miles distant from the *locus in quo;* but no evidence was given to show in what part of the manor the remaining strips were situate. It was held that the three strips had sufficient community of locality with the strip in question to render the evidence with regard to them admissible; but as to the others, the locality of which was not proved, it was held that no evidence was admissible, since the mere fact that they were situate within the same manor created no reasonable probability that the lord had retained and dealt with them in the same way as with the strip in question (*e*).

So, where the question was whether a particular watershed formed the boundary between parishes A and B, evidence was admitted that the continuation of the same watershed formed the boundary between parish A and parish C, the latter parish being on the same side of the watershed as parish B and adjoining to it (*f*). And the same principle has been applied where the question was as to a party's right to a several fishery in a certain length of a navigable tidal river (*g*).

(*e*) *Doe* v. *Kemp* (1835) 2 Bing. (N. C.) 102, followed in the similar case of *Dendy* v. *Simpson* (1856) 18 C. B. 831.

(*f*) *Brisco* v. *Lomax* (1838) 8 A. & E. 198.

(*g*) *Neill* v. *Devonshire* (1882) 8 App. Cas. 135, 137, 151—153, 165, 166.

CHAPTER III.

CHARACTER.

§ 1.—*General Rule.*
§ 2.—*Evidence in Criminal Cases of the Defendant's Character.*
§ 3.—*Evidence of the Character of the Prosecutrix in Prosecutions for Rape.*

§ 1.—General Rule.

The last chapter dealt with the rule which excludes evidence of Similar Facts and it was shown that the apparent exceptions to that rule consist principally of cases where the similar facts admitted in evidence form part of one transaction or series of transactions with the facts in issue.

Closely related to that rule is the one which forms the subject-matter of this chapter, namely, that evidence is not admissible of a man's character for the purpose of proving that he did or did not commit a certain act. The term Character in this rule includes both the inward Disposition of a man, which makes it probable that he would or would not have done the act in question, and the Reputation that he may have acquired, based on his previous conduct, in respect of the commission or non-commission of such acts.

The rule is so long and firmly established that the books present few illustrations of it.

On the trial of a prisoner for wounding a constable who had arrested him on suspicion of felony, the counsel for the prosecution asked the constable the following question: "What do you know has been the prisoner's previous cha-

racter?" The question was objected to on behalf of the prisoner, but allowed. The answer was, "I know the prisoner to be a very bad character." After conviction it was held by the court that this evidence was inadmissible, although the prisoner might have cross-examined the constable as to the grounds of his suspicion; and the conviction was accordingly quashed (*a*). So on a prosecution for an unnatural offence, an admission by the prisoner that he had a tendency to such practices was held inadmissible (*b*). Conversely, in an action of ejectment by an heir-at-law claiming to set aside a will for fraud and imposition committed by the defendant, it was held that the latter was not entitled to call witnesses to prove his general good character (*c*). And on an information (held to be civil in its character) for the recovery of penalties for the keeping of false weights, it was held that the defendant could not call witnesses to character for the purpose of showing that he was incapable of the offence imputed to him (*d*). So in an action of slander for having charged the plaintiff with the theft of certain money, to which the defendant pleaded a justification, it was held that the plaintiff could not call witnesses to prove his general good character for honesty (*e*).

There are however in the criminal law two important exceptions to this rule, which form the subject-matter of the next two sections of this chapter.

(*a*) *R.* v. *Turberfield* (1864) 34 L. J. M. C. 20. The criticism of this case in Russell on Crimes, 6th ed. 1896, vol. 3, p. 426, shows grounds for thinking that the rule was misapplied having regard to the special facts in issue in that case; ordinarily the question cited would undoubtedly be quite inadmissible.

(*b*) *R.* v. *Cole* (1810) Phill. Ev. 10th ed. vol. i. p. 508.

(*c*) *Goodwright* v. *Hicks* (1789) B. N. P. 296.

(*d*) *Att.-Gen.* v. *Bowman* (1791) 2 B. & P. 532, note (*a*).

(*e*) *Cornwall* v. *Richardson* (1825) Ry. & Moo. 305.

§ 2.—Evidence in Criminal Cases of the Defendant's Character.

Although the general rule precludes evidence of the prisoner's bad disposition or reputation being given as part of the case for the prosecution, in order to bring the crime home to him, by an exception long established at the common law the prisoner may in all cases call evidence to show that he has a good character with reference to conduct of the description charged. This exception appears to have been at first admitted in capital cases only, when the law was according to the common estimation of men unduly severe; but it was afterwards extended to all criminal proceedings. Should the prisoner avail himself of his right to offer such evidence, the counsel for the prosecution is entitled to cross-examine his witnesses as to particular facts (*f*) or as to the grounds of their belief (*g*), and also to call rebutting evidence in chief to show that the prisoner does not really possess the character alleged, as it would be unjust that he should have the advantage of a character which in point of fact is undeserved (*h*). By the common law both the evidence in chief offered for the prisoner, and that adduced by the prosecution in reply, must be of the same description, that is, it must in each case consist of evidence of general reputation only; no evidence on either side is admissible either of particular acts of conduct on the part of the prisoner, or of the personal opinion of the witness alone as to the prisoner's disposition, however exceptional may have been his opportunities of observation. Hence the proper question to ask, after ascertaining that the witness is competent to speak as

(*f*) Starkie on Ev. 1st ed. vol. 2, p. 366; *R.* v. *Hodgkiss* (1836) 7 C. & P. 298. Such particular facts would of course include a previous conviction for a similar offence.

(*g*) Starkie on Ev. *ibid.*

(*h*) *R.* v. *Rowton* (1865) L. & C. 520, 529.

to the prisoner's character, is this: "What is the prisoner's general character for honesty (or as the case may be)?" If the witness's answer expresses only his own personal judgment, as, for instance, "My opinion of him is that he is thoroughly honest," it is in strictness inadmissible, although such answers are not infrequently admitted without objection. Again, as it is said that the best character is that which is least talked of, the witness is often permitted to give his evidence in the following form: "I never heard anything against the character of the man for honesty (or as the case may be)."

It follows from what has been said that by the common law the prosecution could not in rebuttal of evidence of the prisoner's good character prove the previous commission of particular acts of a similar description to that charged, or previous convictions for the same. To this however an exception has been made by statute; the Act of 6 & 7 Will. 4 c. 111, which is still in force, enacts as follows (*i*):—

Whereas by an Act . . . . (7 & 8 *Geo.* 4 *c.* 28) . . . . *provision is made for the more exemplary punishment of offenders who shall commit any felony not punishable with death after a previous conviction for felony: And whereas since the passing of the said Act the practice has been on the trial of any person for any such subsequent felony to charge the jury to inquire at the same time concerning such previous conviction: And whereas doubts may be reasonably entertained whether such practice is consistent with a fair and impartial inquiry as regards the matter of such subsequent felony, and it is expedient that such practice should from henceforth be discontinued: Be it therefore enacted . . . . that from and after the passing of this Act* it shall not be lawful on the trial of any person for any such subsequent felony (*k*) to charge the jury to inquire concerning such previous conviction until they shall have inquired concerning such subsequent felony, and shall have found

(*i*) The preamble of this statute was repealed by 53 & 54 Vict. c. 51 (S. L. R. Act, 1890); but, being still necessary for the understanding of the Act, is printed in the text in italics.

(*k*) The words "such subsequent felony" (*i.e.*, felony not punishable with death) are construed as embracing all acts which were in 1836 or have since become not punishable with death.

such person guilty of the same; and whenever in any indictment such previous conviction shall be stated, the reading of such statement to the jury as part of the indictment shall be deferred until after such finding as aforesaid: Provided nevertheless, that if upon the trial of any person for any such subsequent felony as aforesaid such person shall give evidence of his or her good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the indictment and conviction of such person for the previous felony before such verdict of guilty shall have been returned, and the jury shall inquire concerning such previous conviction for felony at the same time that they inquire concerning the subsequent felony.

The exception created by this Act has been extended in certain cases by the Larceny Act, 1861 (*l*), and by the Coinage Offences Act, 1861 (*m*). By the former, any indictment for an offence punishable under that Act may include charges of previous convictions for any felony, misdemeanour or offence punishable upon summary conviction (*n*); and by the latter Act any indictment for an offence punishable thereunder may include charges of previous convictions for any offence against that Act or any former Act relating to the coin. And both statutes contain similar provisions to those of 6 & 7 Will. 4 c. 111, as to the stage of the proceedings at which the previous conviction may be brought before the court, and the conditions under which it may be given in evidence upon the trial of the subsequent felony (*o*).

It is the invariable practice, in cases to which these provisions relate, that no reference whatever should be made in court by anyone either in speech or evidence to the previous conviction until after the issue on the subsequent offence has been decided either by plea of guilty or by conviction, unless

(*l*) 24 & 25 Vict. c. 96, s. 116.

(*m*) 24 & 25 Vict. c. 99, s. 37.

(*n*) But *qu.* whether these words notwithstanding their generality were not intended to be confined (a) to offences of a like kind to that charged, and (b) to such offences of that description as are dealt with by the statute.

(*o*) It is hardly necessary to point out that if the previous offence were connected with the subsequent one, in the manner explained in the last chapter, it would be admissible in evidence by the common law.

the prisoner should adduce evidence of his good character. It has been held that where the prisoner cross-examines the witnesses for the prosecution in support of his good character he "gives evidence" thereof within the meaning of 6 & 7 Will. 4 c. 111 so as to entitle the prosecution to prove the previous conviction (*p*); and this decision is equally applicable to the Larceny and Coinage Offences Acts, the provisions of which are in identical terms.

The Criminal Evidence Act, 1898 (*q*), in defining the liability of the prisoner to cross-examination in respect of his previous conduct and character leaves intact the above rules as to the evidence in chief of character which may be given on the one side and the other. Sub-sect. (f) of sect. 1 is as follows:—

> A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed, or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—
>
> (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
>
> (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or
>
> (iii) he has given evidence against any other person charged with the same offence.

(*p*) *R.* v. *Gadbury* (1838) 8 C. & P. 676; cf. *R.* v. *Shrimpton* (1851) 2 Den. C. C. 319, decided under the Act 14 & 15 Vict. c. 19, s. 9, repealed by 24 & 25 Vict. c. 95, s. 1.

(*q*) See p. 468, below.

§ 3.—Evidence of the Character of the Prosecutrix in Prosecutions for Rape.

In prosecutions for rape, or for attempting to commit rape, or for indecent assault, the defendant is entitled to cross-examine the prosecutrix, and to call evidence, in order to show that she has a general bad character in respect of chastity or morality, as for instance to prove that she is a common prostitute (*r*). He may also cross-examine (*s*) and give evidence (*t*) of specific acts of immorality with himself, as they are held to be relevant upon the question of consent. Further than this he may cross-examine her as to specific acts of immorality with other men; but in this case evidence may not be called to contradict her answers, and she may even decline to answer at all (*u*). If evidence of bad character is called by the defendant, the prosecution may call evidence to rebut it.

The two exceptions just mentioned, in which evidence of character, in the sense of general reputation, is held to be relevant to the issue whether a particular act has been committed, must be distinguished from cases where the character of a party is expressly put in issue in the case, as happens sometimes in actions of libel or slander; and from cases where character is virtually in issue, in the sense that the amount of damages recoverable depends upon it, as for instance, in actions for defamation (*x*), seduction (*y*), or breach of promise of marriage (*z*), or in claims of damages

(*r*) *R.* v. *Clarke* (1817) 2 Starkie, 241; *R.* v. *Barker* (1829) 3 C. & P. 589.

(*s*) *R.* v. *Martin* (1834) 6 C. & P. 562.

(*t*) *Reg.* v. *Riley* (1887) 18 Q. B. D. 481; *R.* v. *Cockcroft* (1870) 11 Cox, 410.

(*u*) *R.* v. *Hodgson* (1812) R. & R. 211; *R.* v. *Cockcroft* (1870) 11 Cox, 410; *R.* v. *Holmes* (1871) L. R. 1 C. C. R. 334, and cases there cited.

(*x*) *Scott* v. *Samson* (1882) 8 Q. B. D. 491; *Wood* v. *Durham* (1888) 21 Q. B. D. 501.

(*y*) *Bamfield* v. *Massey* (1808) 1 Camp. 460; *Bate* v. *Hill* (1823) 1 C. & P. 100; *Verrey* v. *Watkins* (1836) 7 C. & P. 308.

(*z*) *Foulkes* v. *Sellway* (1801) 3 Esp. 236; *Leeds* v. *Cook* (1803) 4 Esp. 256.

for adultery against a co-respondent, which proceed on the same principles as the old action for criminal conversation (*a*). In all these cases the evidence is admitted on different grounds from those discussed in this chapter; the character is either the subject of the inquiry or an element in the estimation of the damage suffered, and does not tend in any way to prove the commission or non-commission of any act.

(*a*) 20 & 21 Vict. c. 85, s. 33; B. N. P. 27, 296.

CHAPTER IV.

RES GESTÆ AND NARRATIVE.

The distinction between the Relevant Facts and the Media of Proof lies, as we have shown in the Introduction (*a*), at the very foundation of the English law of evidence. But inasmuch as in some cases, for the reasons there stated, the distinction is less clear than in others and proves difficult to apply in practice, it is desirable in any account of the relevant facts to attempt to define and illustrate it clearly, before passing to the consideration of the media of proof which form the subject of the next Part of this work.

The distinction in question implies that in any transaction which is the subject of litigation a line can be drawn between such statements of the parties or their agents as form part of the transaction, and are therefore relevant facts, and such as consist of contemporary or subsequent references to it, and are only admissible, if at all, as media of proof. The words which constitute a slander, a fraudulent misrepresentation, or a provocation to assault, are clearly relevant facts in any proceedings founded on those torts; they are acts in law just as much as trespasses to person or property; so are the statements which are made in the course of negotiations leading up to an oral agreement, and which are understood by the parties to form terms of the contract (*b*). But the references

(*a*) See pp. 2—10 above.

(*b*) As Erle J. said in *Shilling* v. *The Accidental Death Co.* (1858) 4 Jur. N. S. p. 244: "There is a category of cases where a man's words are his acts—sometimes, indeed, the most important acts of his life."

that the parties may subsequently make to such statements, at any time before the trial of the matters in dispute, are merely narrative in character, and will be admissible in evidence, if at all, under the head of admissions. Statements which have, in the above sense, the character of acts are frequently distinguished from those which are merely narrative by the technical term Res Gestæ. This term appears to connote all acts which form part of the transaction in issue, whether consisting of statements or not (*c*), but is seldom used except for the purpose of emphasizing the distinction in question and therefore in reference to some form of statement.

The practical importance of this distinction lies in this, that as soon as a statement is shown to be a relevant fact it is at once admissible in evidence as such; whereas if, on the other hand, it is shown to be a narrative statement, it is not necessarily admissible merely because it refers to the facts in issue; every medium of proof has its own special conditions intended to insure credibility, and unless therefore it can be shown to satisfy the definition of some one of these media of proof, it is not admissible.

In many cases this distinction is lost sight of by reason of its being of no practical importance. This is generally the case with the statements and conduct of the parties themselves. Inasmuch as all such statements and conduct, subsequent to the transaction in question, if adverse to the party from whom they proceed, are admissible, if not privileged, under the head of admissions or confessions either express or implied, it is immaterial for the most part to consider where the res gestæ cease, and narrative references begin (*d*).

Where on the other hand the statement is a statement by a party's agent (whose authority is in most cases confined to acting, and does not extend to the making of admissions as

(*c*) *Wright* v. *Doe* (1837) 7 A. & E. 313, 355.
(*d*) But for instances, cp. pp. 10, 209, 214.

to his principal's affairs), the distinction is not unfrequently brought into play. Thus A sues a tramway company for injury caused to him by the tramcar having started whilst he was alighting. Shortly after the accident the engine-driver and the conductor make statements to third persons as to the cause of it, which statements A happens to overhear. Here it is clear that the statements are no part of the transaction in respect of which A sues, and cannot therefore in any case be proved by A as part of the res gestæ or relevant facts. Whether they can be proved as admissions relating to those relevant facts will depend on whether it can be shown that the company's servants had authority to make admissions to those third persons about the company's affairs. This they probably had not; and from this it will follow that although, if they are called as witnesses for the company at the trial, they can be cross-examined by A as to the statements he overheard, with a view of discrediting their testimony for the company and extracting admissions from them; yet if on the other hand their death or any other cause should prevent their being called, A cannot give any evidence of the statements made by them.

The following are a few illustrations from the books.

In an action in 1840 by a stock-jobber for £5,000, the price of certain stock alleged to have been sold and transferred to the defendant, the defence was that the plaintiff had given credit to one Taylor and not to the defendant. It appeared at the trial that a stock-broker of the name of Taylor had applied to the plaintiff for £5,000 of stock for the defendant, that the plaintiff had procured the same and transferred it in the books of the Bank of England into the name of the defendant, and that the latter had accepted the stock so transferred. The plaintiff's case was that, although it was usual for the seller in such cases to look to the broker, he had in this instance not done so, but had given credit to the defendant alone. On this point evidence was tendered

on behalf of the plaintiff of a conversation which had taken place between him and Taylor immediately after the transfer, on the occasion of his asking for payment. The plaintiff had requested Taylor to give him the cheque of his principal, whereupon Taylor gave him his own cheque, requesting that it might not be presented until the next day. The evidence was objected to on the ground of the conversation having been subsequent to the transfer; but the objection was overruled, and the ruling of the judge was upheld by the Court. Lord Abinger C. J. said:—

> The third point is as to the admission of the evidence of what occurred between Taylor and the plaintiff, immediately after the transaction. As a general principle, it is undoubtedly true that conversations with an agent after the transaction are not evidence against his principal; but the question is, whether this be not a part of the res gestæ? It is part of the evidence to show that the plaintiff did not trust Taylor, and I do not know how it could have been shown otherwise. It is before the transaction is concluded, that is, before payment is made; and I think it is receivable; it is not a conversation between an agent and principal after the transaction is concluded, but a conversation at the time he is dealing with him, and a part of the res gestæ (*e*).

In another case the facts were these: A sued D for the return of certain goods; D alleged that the goods had been sold by A to C, and had been purchased by himself from C; A on the other hand alleged that the goods had been improperly obtained from him by C, purporting to purchase them on behalf of one B who had not in fact authorised C to purchase them. The issue therefore was whether A's contract of sale was with B or with C, A's case being that C had represented himself to be desirous of purchasing solely on behalf of B, and that A had agreed to sell subject to his being satisfied with the responsibility of B, although pending enquiry as to B, A had permitted C to have delivery of the goods. This being the conflict between the parties, A tendered in

(*e*) *Mortimer* v. *McCallen* (1840) 6 M. & W. 58, 69.

evidence a letter written to his own agent directing him to make inquiries as to the responsibility of B, which letter contained incidentally the statement that B was purchasing the goods through C. The letter was admitted, and the question subsequently raised before the full court was whether it was admissible. The court held that the obtaining of the information as to B's responsibility was part of the transaction in issue, and that the defendant was not entitled to object to the letter being given in evidence merely because no evidence was given as to the result of the enquiry, inasmuch as no objection on that ground to its admissibility was taken at the trial; and they held that it followed from their deciding that the latter was a step in the transaction of sale that it was part of the res gestæ and that, the letter being admissible on this ground, the incidental mention of the nature of the transaction could not be excluded (*f*).

In another case B had consigned goods to A and drawn on him for 75 per cent. of their value; the goods were sent abroad by A and sold for an amount insufficient to repay him the amount of the draft which he had duly met; A sued B for reimbursement, alleging that the transaction, which had been entered into by A's agent in Liverpool, was an advance merely; B on the contrary alleged that the consignment was on the terms that any such loss as that in question should be borne by A. To contradict this, A tendered in evidence a letter which was written to him by his agent at Liverpool, who had since died, reporting the terms on which he had received B's consignment for A as his principal. It was held that the letter was no part of the res gestæ, and, as it did not fall under any recognised medium of proof, could not be given in evidence at all (*g*).

In an action for damage brought by the owner of the steam-

(*f*) *Milne* v. *Leisler* (1862) 7 H. & N. 786.
(*g*) *Smith* v. *Blakey* (1867) L. R. 2 Q. B. 326, 328.

ship *Mary Nixon* against the steamship *Douglas* and her freight the case was this: about six o'clock on an evening in October the steamship *Douglas* sank in Gravesend Reach and lay in mid-channel with one mast above water obstructing the navigation. Shortly after midnight the *Mary Nixon* came into collision with the wreck and suffered damage, for which her owners now claimed compensation on the ground *inter alia* of negligence on the part of those in charge of the *Douglas* in not taking proper steps to warn approaching vessels of the position of the wreck. To meet this charge of negligence the defendants tendered evidence to show that the mate of the *Douglas*, soon after the sinking of his vessel, instructed the master of a tug called the *Endeavour* to report the fact to the harbour-master at Gravesend and request him to take care of the wreck, and that shortly afterwards the captain of the *Endeavour* reported to him, as the fact was, that the harbour-master had said that the proper wreck-lights would be immediately sent to the *Douglas*. This evidence was rejected at the trial on the ground, apparently, that, as hearsay, it was inadmissible; but on an application by the defendants for a new trial, it was held by the court that it ought to have been admitted as being a relevant fact to disprove negligence on the part of those in charge of the *Douglas* (*h*); the statements in question were themselves acts of diligence, measures taken towards making the navigation of the river safe.

Further illustrations of the distinction in the case of the statements and conduct of agents will be found in Part III in the chapter on Admissions (*i*), which should be referred to here.

The distinction is no less valid when conduct, equivalent to admissions or declarations of fact or opinion, takes the place of oral statements. Thus, in an action of ejectment brought

(*h*) *The Douglas* (1882) 7 P. D. 151.
(*i*) See below, pp. 163, 164; 167, 168.

by heir-at-law against devisee the principal question was whether one John Marsden, deceased, who by his will had devised to the defendant the property in question, was at the time of its execution of competent understanding. In support of the testator's competency the defendant tendered in evidence three letters which had been found after the testator's death in a cupboard under a book-case in his library inclosed in envelopes addressed to him, of which the seals had been broken. The first was an affectionate letter from a cousin of the testator while in America referring to other members of the family and to his own travels. The second was from a clergyman referring to some difficulty between the testator and his parish or township, urging that a case should be settled and laid before counsel for his opinion, and requesting an answer. The third was written by another clergyman, on the occasion of his resigning a curacy to which the defendant had appointed him, and was full of warm expressions of gratitude for his kindness. The writers of these three letters were all dead. It was admitted that almost every transaction done or expression used by the testator, and his manner of conducting himself in the most ordinary concerns of life, would be relevant to the issue; but the plaintiff objected to the admission of these letters on the ground that their only effect was to show that the several writers of them had all held the opinion that the testator was a person of ordinary intelligence and capacity (in which view they would not be admissible, being hearsay evidence, the opinions of deceased persons); unless indeed it could be shown that the testator had read and appeared to understand their contents, which would clearly have been an act on his part relevant to the issue of his sanity. There was however no direct evidence that he had ever done so; and it was held that the presumption of their having been read and understood, which in ordinary cases might well have been made from their being found opened among the testator's papers, could not be drawn in this case, inasmuch as the

capacity of the testator to so read and understand was involved in the very issue to be tried. The letters were accordingly rejected as being neither res gestæ nor media of proof, and their rejection was upheld by the court (*k*).

There are two important classes of statements or declarations as to which there seems to have existed some doubt whether they should be regarded as res gestæ or as media of proof. They are known as Declarations Accompanying Acts and Declarations as to State of Health. In this book they have been placed among the Media of Proof, inasmuch as that appears on the whole to be their most appropriate place (*l*); but the discussion of them will be found to illustrate the subject of this chapter and they should be referred to here. Similar doubts existed as to the proper classification of another head of evidence, namely, recent complaints made by women and girls who had been victims of rape or kindred offences; the true character of this evidence has however been settled since the first edition of this work by the leading case of *R.* v. *Lillyman* (*m*), and the subject will be found discussed at a later page under the head of Corroborative Evidence (*n*).

The distinction between res gestæ and narrative is no less valid in the case of documents than in that of oral statements and conduct, as will be seen in the next chapter.

(*k*) *Wright* v. *Doe* (1837) 7 A. & E. 313; *S.C.* in H. L. 4 Bing. N. C. 489; cf. *Backhouse* v. *Jones* (1839) 6 Bing. N. C. 65. See pp. 144, 145, below.

(*l*) See Chapters VI and VII of Part III at pp. 199, 203.

(*m*) [1896] 2 Q. B. 167.

(*n*) See Chapter III of Part IV at pp. 345—350.

CHAPTER V.

DOCUMENTS AS RES GESTÆ OR RELEVANT FACTS.

§ 1. *Distinction between Res Gestæ and Narrative as applied to Documents.*

§ 2. *Extrinsic Evidence inadmissible of Transaction embodied in a Document.*

§ 3. *Extrinsic Evidence admissible to apply the Document correctly.*

§ 4. *Extrinsic Evidence of Custom or Usage.*

§ 5. *Extrinsic Evidence of Collateral Agreement.*

§ 6. *Extrinsic Evidence to invalidate the Transaction embodied in the Document.*

§ 1. Distinction between Res Gestæ and Narrative as applied to Documents.

Whether in any given case a document is to be regarded as a res gesta or a medium of proof, depends on the purpose for which it is adduced with reference to the facts in issue. Thus A writes a letter to B complaining that on a certain date he was dismissed from the service of C because he refused to join C in the commission of a crime, and asking for pecuniary aid from B. The alleged grounds of dismissal are false, C not having done any such thing. If proceedings are taken against A, either by C for libel, or by B for obtaining money by false pretences, the letter will be given in evidence as a res gesta creating liability. If, on the other hand, in some other proceeding against A, the fact of his service with C should be brought in question, the letter would be admissible against him, not as a res gesta, but as a medium of proof (that is to say an admission) of the service

admitted in it. The same distinction holds good with reference to the different effect in evidence of the recitals and the words of grant in a deed; thus the plaintiff in an action to recover land, who, to prove his right to the property, relies on a series of title-deeds to which the defendant was no party, is entitled to give in evidence against the defendant the operative parts of the title-deeds, since the grants are acts in law forming the steps of the plaintiff's title and therefore relevant to his case; but he is not entitled to read the recitals as proof of the facts recited in them, since these are simply narratives or records of those facts, made by persons who had no authority to make admissions to bind the defendant (*a*). If, on the other hand, the defendant or his predecessors were parties to the deeds, the recitals would, as admissions, be a legitimate medium of proof as against the defendant of any relevant facts stated in them. And the same distinction can perhaps be traced in the case of judgments; if in an action by a creditor of a firm against one of its members, the defendant pleads and proves a judgment recovered by the plaintiff for the same debt in a previous action by him against the defendant's co-partner, the judgment pleaded has the force of a res gesta, an act in law which has extinguished the defendant's liability (*b*). On the other hand, where in an action of trespass to land the issue is whether the place in question is a public highway, previous judgments recovered by the same plaintiff in similar actions of trespass against other defendants have been admitted in evidence as a medium of proof analogous to reputation, in aid of the plaintiff's contention that the place is not a highway (*c*).

This distinction between a document which is tendered in evidence as a res gesta and one which is used only as a

(*a*) *Bristow* v. *Cormican* (1878) 3 App. Ca. 641, 643, 644, 662.

(*b*) *Kendall* v. *Hamilton* (1879) 4 App. Ca. 504.

(*c*) See pp. 232—234, where the character of this evidence is discussed.

medium of proof is well illustrated by the difference between a mere receipt and an accord and satisfaction. A passenger injured by a railway accident accepted £400 from the railway company, and gave them a receipt, the body of which was in the following terms :—

> Received from the Lancashire and Yorkshire Railway Company the sum of £400 in discharge of my claim in full upon that company for all loss sustained and expenses incurred by the late accident at Miles Platting, September 25th, 1865, including all expenses attending the same.
>
> (Signed) Thos. Vincent Lee.

The passenger afterwards finding that his injuries were more serious than he had supposed, sued for further damages, and in answer to the company's plea that he had accepted the £400 in full satisfaction and discharge, alleged that he had signed the receipt on the express condition that he should not thereby exclude himself from further compensation if his injuries turned out more serious than was supposed at the time. Mellish L. J. in delivering judgment said (*d*) :—

> I had some little doubt in the course of the argument whether it might not be said that this document amounted to an agreement, in which case, no doubt, the rule of law would apply that, if the parties had reduced their agreement into writing, they could not vary the terms of that agreement by parol evidence; but, on looking at the document, I am convinced that it is simply a receipt. It simply states a fact—it does not state an agreement or purport to bind either of the parties to any terms whatever; it simply acknowledges that a sum of money was received, and then states in respect of what it was received, viz., in satisfaction of the damages the plaintiff had sustained in the

(*d*) *Lee* v. *Lancashire & Yorkshire Rail. Co.* (1871) 6 Ch. 527, 534. In a very similar case which came before the Court of Appeal in 1901 the plaintiff had signed a receipt "in full satisfaction and discharge of all claims in respect of injuries sustained," *i.e.* in a certain collision on the defendants' railway. It was held by the Court that it was a question of fact whether the receipt was intended as the record of an accord and satisfaction of all future damage. *Ellen* v. *Great Northern Rail. Co.* (1901) 17 T. L. R. 453. Cf. *Singleton* v. *Barrett* (1832) 2 C. & J. 368; *Allen* v. *Pink* (1838) 4 M. & W. 140; *Farrar* v. *Hutchinson* (1839) 9 A. & E. 641.

collision. . . . A receipt not under seal . . . amounts simply to an acknowledgment, and has the same effect as if a man had written a letter saying that he had received a sum of money in satisfaction, or as if, in the course of conversation, he had mentioned he had received it in satisfaction; it is merely evidence of satisfaction, and liable to be rebutted by contrary evidence.

Documents which are tendered in evidence as res gestæ come into existence as such in various ways. There are many acts for which writing is not prescribed by law, but which as a matter of convenience, or for the purpose of preserving a record of them, are committed to writing. These may be acts of one party alone, as, for instance, a notice to quit reduced to writing, where under the terms of the tenancy an oral one would have done, or a written gift of a chattel accompanied by delivery. But the most important cases consist of contracts reduced by common consent into writing as a final record of the terms agreed. It is not ordinarily necessary that a written contract should be reduced into a single writing; it may be contained in a series of letters or other documents; and it is for the court to determine whether they were intended to be the final and sole record of the bargain between the parties. If the documents do not appear to contain all the terms agreed, or if, though they appear to be final, it can be proved by evidence which does not contradict them that they were only proposals, and were either followed by subsequent proposals or were simply refused, oral evidence will be admissible to explain or displace them (*f*). If on the other hand it is proved that they were intended to constitute the contract, they will exclude all extrinsic evidence as to the terms of the transaction (*g*).

There are, again, many acts which are inoperative or

(*f*) *Wake* v. *Harrop* (1861) 6 H. & N. 768, 775; *Johnson* v. *Appleby* (1874) 43 L. J. C. P. 146.

(*g*) *Doe* v. *Cartwright* (1820) 3 B. & A. 326; *Hawkins* v. *Warre* (1825) 3 B. & C. 690; *Locket* v. *Nicklin* (1848) 2 Ex. 93; *Stones* v. *Dowler* (1860) 29 L. J. Ex. 122.

invalid as such, unless reduced into writing. These also comprise both unilateral and bilateral acts. Examples of the former are a will, and a notice to quit for which writing is prescribed by the contract of tenancy. Examples of the latter are grants of incorporeal hereditaments by the common law, conveyances under the Act to amend the Law of Real Property, 1845, bills of exchange, marine policies, and contracts within sect. 4 of the Statute of Frauds (*h*), or within sect. 4 of the Sale of Goods Act, 1893 (*i*) (which re-enacts in substance the provisions of sect. 17 of the Statute of Frauds).

The effect of these sections of the Statute of Frauds and of the Sale of Goods Act, 1893, and of the decisions and rules of court relating to them, so far as they bear on the subject of this chapter, may be stated as follows: (i) The want of writing does not invalidate the transaction, but only affects the proof of it (*k*); (ii) if the written memorandum comes into existence at any time before the bringing of an action for the enforcement of the contract, the statute is complied with (*l*); (iii) it is not necessary that the whole contract should be in writing, or that it should be signed by both parties; it is sufficient that the memorandum contains the particulars held requisite for compliance with the statute, and that it is signed by the party who is sought to be charged or his agent in that behalf (*m*); (iv) the absence of writing is a defence which the defendant may waive, and which he must specially plead if he intends to rely on it (*n*).

(*h*) 29 Car. 2 c. 3. For the terms of this section see p. 466, below.

(*i*) 56 & 57 Vict. c. 71. For the terms of this section see p. 466, below.

(*k*) *Maddison* v. *Alderson* (1883) 8 App. Ca. 467, 488.

(*l*) *Lucas* v. *Dixon* (1889) 22 Q. B. D. 357.

(*m*) See the statute itself. The effect of sect. 17, and the numerous decisions on it, were digested by Mr. Justice Stephen and Sir F. Pollock, and will be found in Vol. I of the Law Quarterly Review, p. 1.

(*n*) R. S. C. Ord. XIX rr. 15, 20; *Clarke* v. *Callow* (1876) 46 L. J. Q. B. 53; *Dawkins* v. *Penrhyn* (1878) 4 App. Ca. 51, 58; County Court Rules, 1903, Ord. X r. 18.

§ 2. Extrinsic Evidence inadmissible of a Transaction embodied in a Document.

The distinction explained in the earlier part of the last section leads naturally to this general rule, that whenever a document is constituted either by statute or by the act of the parties the sole record of a transaction, and is given in evidence as such, all extrinsic evidence of the transaction which it records or constitutes is excluded; whereas, when it is put in evidence not as a res gesta but as a medium of proof referring to some antecedent act or matter, it is not exclusive evidence of the fact referred to in it, but the statements contained in it may be corroborated or displaced or explained by other evidence. This must not be confounded with the rule, to be mentioned later (*o*), by which the *contents* of a document must be proved by the production and inspection of the document itself, save in certain excepted cases. That is a rule which is equally true of all documents for whatever purpose they are tendered. The present rule, which might be said to be self-evident but that litigants have so often sought to evade it, prohibits any evidence *outside the contents* of the document with regard to the transaction which is the subject of the document, where by the agreement of the parties or otherwise the document has been virtually constituted *the transaction itself*.

This rule against varying by extrinsic evidence the terms of a transaction embodied in a written instrument applies to documents of all kinds; but it is most often called into operation in the case of formal documents, such as wills and deeds, which are usually founded on previous negotiations, drafts, and agreements; and as the only object of tendering evidence of the terms of such preliminary matters is to vary in some respect the effect of the final instrument by showing

(*o*) See pp. 350—359, below.

that it does not truly represent the real intention of the parties, the rule is often expressed simply in these terms, that *No evidence may be given to vary or add to the terms of a written instrument* (*p*).

The following are some illustrations from the books :—

A testator by his will devised all his real estate "in the County of Limerick and in the City of Limerick." He had in fact no real estate in the County of Limerick, but had estates in the County of Clare which were not referred to in the will. It was held that the devisee could not give in evidence the first draft of the will which showed that the words "County of Clare" had been erased from the devise by the conveyancer in mistake, inasmuch as that would amount to the making of a new devise for the testator by parol evidence, just as much as if a blank left in his will were to be filled up (*q*).

In the case of a judgment it has been held that no evidence either of the judge who delivered it (*r*) or of any officer of the Court who was present when it was given (*s*) is admissible to vary the effect of its terms.

So where a deed conveyed a house "with its appurtenances" to the defendant, both the conditions of sale which excluded a small garden adjoining the house, and the subsequent admissions of the defendant that he had not purchased the garden, were held to be inadmissible as tending to contradict the deed, and the garden passed under the conveyance (*t*).

In another case the plaintiffs purchased goods on the terms that payment of the price was to be made in exchange

(*p*) *Countess of Rutland's Case* (1604) 5 Co. 26, where the grounds of the rule are eloquently stated by Popham C. J. ; *Goss* v. *Nugent* (1833) 5 B. & Ad. 58, 64 ; *Nichol* v. *Godts* (1854) 10 Ex. 191, 194 ; *Wake* v. *Harrop* (1861) 6 H. & N. 768, 775 ; *Burges* v. *Wickham* (1863) 3 B. & S. 669, 696.

(*q*) *Miller v. Travers* (1832) 8 Bing. 244.

(*r*) *Dews* v. *Ryley* (1851) 20 L. J. C. P. 264.

(*s*) *Stonor* v. *Fowle* (1887) 13 A. C. 20 at p. 27.

(*t*) *Doe* v. *Webster* (1840) 12 A. & E. 442.

for a bill of lading which was for the goods shipped at Fiume for delivery at Dunkirk, with the usual exception of sea perils and with liberty to call at ports in any order. The vessel deviated to Glasgow and was lost by perils of the sea off the Clyde. The plaintiffs sued the shipowners for non-delivery, and it was held that the latter were not entitled to give evidence as against the plaintiffs that the shippers assented to the deviation and thereby contradict the bill of lading: and the owners were held liable (*u*).

And the fact that both parties to a contract have misconstrued its terms will not affect their construction where they are clear and unambiguous (*x*).

The rule excludes extrinsic evidence in writing equally with that which is oral (*y*). But it does not seem to be clearly settled whether extrinsic evidence is or is not admissible to vary or exclude implied terms, as for instance the terms of a custom or trade usage which but for some express agreement to the contrary would be imported into the contract (*z*).

§ 3. Extrinsic Evidence admissible to apply the Document correctly.

Although extrinsic evidence may not be given to vary the terms of a written instrument, it may always be given to explain the circumstances in which it was executed and the state of facts to which it is to apply, and thus in effect to

(*u*) *Leduc* v. *Ward* (1888) 20 Q. B. D. 475.

(*x*) *N. E. Rail. Co.* v. *Hastings* [1900] A. C. 260.

(*y*) *Halhead* v. *Young* (1856) 25 L. J. Q. B. 290, 293.

(*z*) *Fawkes* v. *Lamb* (1862) 31 L. J. Q. B. 98; *Burges* v. *Wickham* (1863) 33 L. J. Q. B. 17; *Clapham* v. *Atkinson* (1864) 34 L. J. Q. B. 49. It would seem on principle that the opinion of Blackburn J. expressed in the first two of these cases, holding that the evidence should be excluded, is the sounder view.

some extent define its operation. In *Burges* v. *Wickham* (*a*) it was held that the extent of the obligation imported by the implied warranty of seaworthiness is relative to the nature of the adventure *i.e.* the character of the voyage and the class of vessel, so that oral evidence of the latter is admissible in order that the extent of the obligation may be ascertained. Blackburn J. there stated the rule in question as follows (*b*) :—

> It is always permitted to give extrinsic evidence to apply a written contract and show what was the subject-matter to which it refers. When the stipulations in the contract are expressed in terms which are to be understood, as logicians say, not *simpliciter sed secundum quid*, the extent of the obligation cast upon the party may vary greatly, according to what the parol evidence shows the subject-matter to be; but this does not contradict or vary the contract; for example, in the demise of a house, with a covenant to keep it in tenantable repair, it is legitimate to inquire whether the house be an old one in St. Giles's or a new palace in Grosvenor Square, for the purpose of ascertaining whether the tenant has complied with his covenant; for that which would be repair in a house of the one class is not so when applied to a house of the other—see *Payne* v. *Haine* (*c*). So, suppose the sale of a horse warranted to go well in harness, the qualities necessary to constitute a good goer in harness would be different in a pony fit to draw a lady's carriage and a dray horse; or in a lease of Whiteacre for a year, with an express contract to cultivate it in a proper manner, the quantity of manure and labour the tenant would have to bestow must be different according as Whiteacre consists of hop-gardens or meadows. In each of these cases you legitimately inquire what is the subject-matter of the contract; and thus the terms of the stipulation are to be understood, not *simpliciter*, but *secundum quid*.

Thus with regard to wills it is held that oral evidence is admissible to prove all material facts in existence at the date of the will and relating either to the family of the testator or to the subject-matter of the devise, as, for instance, that the property was or was not in the possession of the testator, the mode of acquiring it, and its local situation and

(*a*) 33 L. J. Q. B. 17.
(*b*) *Ibid.* p. 28.
(*c*) 16 M. & W. (1847) 541.

distribution, as well as any facts which may have affected changes in the family or in the property between the dates of the will and of the death, and any other facts necessary to be known in order that the will may be correctly applied (*d*). On the same principle oral evidence has been admitted to ascertain the meaning and application of the terms "your wool" (*e*), and "your employ" (*f*), contained in written contracts. A familiar illustration of the rule is supplied by the cases where evidence is admitted to ascertain whether a particular piece of land is "parcel or no parcel" of a certain estate granted by some description or local designation which needs elucidation, such as "Trogue's farm" (*g*), or "all those brickworks, &c. now in the possession of A. B." (*h*). And on the same principle stands the evidence admitted to explain old charters by reference to the user and possession had under them, as, for instance, to prove the extent and meaning of the terms "terra de Gower" (*i*), "inhabitants" (*k*), and "three acres of meadow" (*l*).

Under the same head fall cases of so-called latent ambiguity, that is, cases where the words of the instrument are in themselves clear, but there exist more than one person or thing to which the instrument may be applied, so that oral evidence is necessary to solve the ambiguity. It is difficult to classify the numerous cases which have been decided under this rule.

(*d*) *Doe* v. *Huthwaite* (1820) 3 B. & A. 632; *Doe* v. *Martin* (1833) 4 B. & Ad. 771, 785; *Stringer* v. *Gardiner* (1859) 27 Beav. 37; *Webber* v. *Stanley* (1864) 33 L. J. C. P. 220.

(*e*) *McDonald* v. *Longbottom* (1859) 28 L. J. Q. B. 293; 29 L. J. Q. B. 256.

(*f*) *Mumford* v. *Gething* (1859) 29 L. J. C. P. 105.

(*g*) *Goodtitle* v. *Southern* (1813) 1 M. & S. 299.

(*h*) *Paddock* v. *Framley* (1830) 1 C. & J. 90; cp. *Doe* v. *Hubbard* (1850) 15 Q. B. 227.

(*i*) *Beaufort* v. *Swansea* (1849) 3 Ex. 413; cf. *Calmady* v. *Rowe* (1848) 6 C. B. 861; and *Hastings* v. *Ivall* (1874) 19 Eq. 558.

(*k*) *Att.-Gen.* v. *Parker* (1747) 3 Atk. 576; *R.* v. *Mashiter* (1837) 6 A. & E. 153; *R.* v. *Davie*, *ibid.* 374, 386.

(*l*) *Stammers* v. *Dixon* (1806) 7 East, 200.

The simplest case is where the description is correct but equivocal; as where the devise was "to George Gord, the son of Gord," and there were two George Gords, one the son of John Gord and the other of George Gord (*m*), or where the devise was of "the close in Kirton, now in the occupation of J. W.," there being two closes in Kirton belonging to the testator, each in the occupation of J. W. at the date of the will (*n*). Sometimes however difficulty arises from inaccuracy of description. Whether an inaccurate description will vitiate an intended grant or devise (whether there exist ambiguity or not) will depend on whether the part of the description which is accurate is such a complete description that the misdescribing part may be justly regarded as a mistake and rejected as a *falsa demonstratio* in order to prevent the failure of the instrument. Thus, A having a mansion-house at Tedworth in Hants with lands in Hants and adjoining lands in Wilts, enjoyed as one estate, devised to B all her property in Hants "hereinafter referred to as my Tedworth estate"; it was held that the property in Hants alone passed, the words "Tedworth estate" being treated as a misdescription (*o*). If on the other hand the misdescription is such that the proof of the grantor's or devisor's real intention would amount to setting up an oral grant or devise, the evidence will be rejected as in the case of the Clare estates mentioned above (*p*). Assuming however that the inaccurate part can be thus rejected, then, if the accurate part applies equally to two persons or things, the latent ambiguity may be solved as before by oral evidence (*q*).

A somewhat different difficulty is that which is introduced by the use of a word in a non-natural sense. If it can be

(*m*) *Doe* v. *Needs* (1836) 2 M. & W. 129.
(*n*) *Richardson* v. *Watson* (1833) 4 B. & Ad. 787.
(*o*) *Webber* v. *Stanley* (1864) 33 L. J. C. P. 217, 220.
(*p*) See p. 105, note (*q*).
(*q*) *Re Feltham's Trusts* (1855) 1 K. & J. 528.

shown that by constant user within a certain locality or among a certain class of persons a word has acquired an artificial sense, and it appears that the instrument was made under such circumstances that the word may be presumed to have been therein used in that sense, then (whether there be any other source of ambiguity or not) the court will act on the evidence so admitted and construe the document accordingly (*r*). On this principle the words "a thousand rabbits" in the lease of a rabbit warren have been held to mean twelve hundred (*s*), and "year" in an actor's engagement to mean the theatrical season (*t*). Somewhat similarly oral evidence has been held admissible to prove that a testator alone habitually used a certain misdescription found in his will, as, for instance, where he always spoke of his wife's nephew as his nephew, although he had a nephew of his own of the same name, with whom however he was not on terms of intimacy (*u*). And where the misdescription is such that it is capable of correction by means of evidence, and after it has been so corrected it still appears that there are two objects to which the term may have been intended to be applied, a case of latent ambiguity arises which may be solved according to the rule by oral evidence (*x*).

Analogous to these cases is the evidence, always admissible, of the meaning of technical words, cyphers, shorthand and foreign languages, when used in documents.

Where a contract need not be reduced into writing to comply with any statute, the parties may either put the whole contract into writing, or contract by parol only, or put some of the terms in writing and arrange others by word of mouth; in the last case, although that which is written may

(*r*) *Holt & Co.* v. *Collyer* (1881) 16 Ch. D. 718, 720.
(*s*) *Smith* v. *Wilson* (1832) 3 B. & Ad. 728.
(*t*) *Grant* v. *Maddox* (1846) 15 M. & W. 737.
(*u*) *Grant* v. *Grant* (1869) L. R. 2 P. & D. 8.
(*x*) *Charter* v. *Charter* (1871) L. R. 2 P. & D. 315.

not be varied by parol evidence, the terms arranged by parol may be proved by parol and they then supplement the writing and so form one entire contract (*y*). And it follows that where such a contract is contained in several documents which contain no internal reference to one another they may be connected by oral evidence (*z*).

Where on the other hand the contract or some memorandum of it is required by statute to be in writing, the rule of proof is this, that if it is contained in several documents, then, in order that one document may be connected with another for the purpose of their being read together, it must be shown that one of them contains a reference to the other; and parol evidence is only admissible where the reference contains a possible ambiguity which requires to be solved. In the leading case of *Long* v. *Millar* (*a*) the rule was stated by Thesiger L. J. in these terms (speaking with reference to a case within the Statute of Frauds):—

> When it is proposed to prove the existence of a contract by several documents, it must appear upon the face of the instrument signed by the party to be charged that reference is made to another document; and this omission cannot be supplied by verbal evidence. If however it appears from the instrument itself that another document is referred to, that document may be identified by verbal evidence. A simple illustration of this rule is given in *Ridgway* v. *Wharton* (*b*); there "instructions" were referred to; now instructions may be either written or verbal; but it was held that parol evidence might be adduced to show that certain instructions in writing were intended. This rule of interpretation is merely a particular application of the doctrine as to latent ambiguity. Although parol evidence may be given to identify the document intended to be referred to, it must be clear that the words of the document signed by the party to be charged will extend to the document sought to be identified.

(*y*) Anson on Contract, 11th ed. p. 81.

(*z*) *Edwards* v. *Aberayron Mutual Ship Insurance Society* (1876) 1 Q. B. D. 563, 586, 587.

(*a*) (1879) 4 C. P. D. 450.

(*b*) (1857) 6 H. L. C. 238.

Long v. *Millar* (*b*) was an action for damages for breach of contract to sell land, and the memorandum signed by the plaintiff (the purchaser of real estate from the defendant), contained the particulars of the property and the terms of the contract, including a statement of the price, and of the deposit which the plaintiff paid. The defendant's receipt was in these terms: "21st September, 1877. Received of Mr. George Long the sum of £31 as a deposit on the purchase of three plots of land at Hammersmith. Chas. W. Millar." It was held that the word "purchase" was a sufficient reference to the document signed by the plaintiff, and that oral evidence was admissible to connect them and thereby establish a complete contract.

In other cases the words "terms agreed on" (*c*), "our arrangement" (*d*), and "on account of the purchase-money" (*e*), have been treated as words referring to other documents and have been cleared of ambiguity by oral evidence.

On like grounds oral evidence is admissible to prove that a person not named in the written contract is the principal of one of the parties to it, for this evidence does not contradict the written terms (*f*). So too evidence may be given to show the relation of principal and surety between the parties to a contract, and thereby materially affect its applica-

(*b*) (1879) 4 C. P. D. 450.

(*c*) *Baumann* v. *James* (1868) 3 Ch. 508.

(*d*) *Cave* v. *Hastings* (1881) 7 Q. B. D. 125.

(*e*) *Oliver* v. *Hunting* (1890) 44 Ch. D. 205. It seems that this must be taken to be the ground of this decision. These cases do not appear to conflict with the old leading case of *Boydell* v. *Drummond* (1809) 11 East, 142, though the Courts appear to be far readier than they were in 1809 to find words of reference to connect the separate documents. In *Pearce* v. *Gardner* [1897] 1 Q. B. 688, it was held that an envelope, proved to have contained a certain letter, might be read with the letter as one document for the purpose of showing to whom the letter was addressed.

(*f*) *Higgins* v. *Senior* (1841) 8 M. & W. 834, 844. If on the other hand the agent who signed the contract had tendered this evidence to discharge himself it would have been inadmissible: *ibid.*; cf. *Young* v. *Schuler* (1883) 11 Q. B. D. 651.

tion (*g*). In the case of negotiable instruments evidence of this description admitted to prove the facts and circumstances attendant on their making, issue and transference, may have the effect of qualifying, altering, or even inverting, the relative liabilities which the law-merchant would otherwise assign to them (*h*).

§ 4. Extrinsic Evidence of Custom or Usage.

Wherever there exists in a certain locality, or among a certain class of men, as, for instance, those engaged in a certain trade, a usage so general that it may be presumed that parties contracting in regard to that which is the subject-matter of the custom must have contracted with reference to the custom, the terms of the custom will be deemed to have been incorporated in the contract, provided the written terms of the contract are not inconsistent with it; and oral evidence may be given as to its scope and effect (*i*). The most conspicuous instances of this rule are the agricultural customs of different parts of the country, held to be incorporated in leases between landlord and tenant, and the numerous commercial usages to be found in almost every trade in the kingdom (*k*).

§ 5. Extrinsic Evidence of Collateral Agreement.

Notwithstanding that a written contract appears on the face of it to be a complete record of the agreement of the parties, it may be proved that it was made subject to some condition or agreement which was intentionally omitted from the document. In cases sought to be brought within this

(*g*) *Reynolds* v. *Wheeler* (1861) 30 L. J. C. P. 350.

(*h*) *Macdonald* v. *Whitfield* (1883) 8 A. C. 733 at p. 745.

(*i*) *Hutton* v. *Warren* (1836) 1 M. & W. 466, 475. Cf. *Moult* v. *Halliday* (1898) 1 Q. B. 125, for the custom that master and domestic servant are entitled to a month's notice on either side.

(*k*) *Wigglesworth* v. *Dallison* (1779) 1 Sm. L. C.

exception it is a question of fact whether the term or condition of which oral evidence is tendered, was on the one hand either mere negotiation or an honourable understanding, or was on the other hand intended by the parties to be a legal obligation collateral to their written contract. The courts have been somewhat liberal in particular cases in adopting the latter view; but it would seem that the principle to be deduced from the cases is this, that the condition will be deemed collateral, and so provable by oral or written evidence *dehors* the main agreement, whenever it can be shown (i) that it is not inconsistent with the terms of the written contract, (ii) that it was intended to operate as a legal obligation, and (iii) that it was intended to be collateral to, and was purposely omitted from, the written contract (*l*).

The leading decision under this head is *Morgan* v. *Griffith* (*m*). In that case A, having arranged the terms on which he was to take on lease certain grass lands of B, entered into possession, but declined to execute the lease unless B would undertake to destroy the rabbits on the lands. B having promised this, the lease, which was silent on the point, was executed. The rabbits not having been destroyed, A sued B for the consequent damage, and it was held that the lease did not preclude proof of the parol agreement and that A was entitled to recover. The principle of this case has frequently been applied, and the reported decisions are reviewed in *De Lassalle* v. *Guildford* (*n*). There the plaintiff and defendant had negotiated for the lease of a house by the defendant to the plaintiff. The terms were arranged, but the plaintiff refused to hand over the counterpart lease unless he received an assurance that the drains were in order. The defendant

(*l*) *Morgan* v. *Griffith* (1871) L. R. 6 Ex. 70; *Erskine* v. *Adeane* (1873) 8 Ch. 756; *Angell* v. *Duke* (1875) L. R. 10 Q. B. 174; 32 L. T. 320; *Carter* v. *Salmon* (1880) 43 L. T. N. S. 490; *New London Credit Syndicate, Ltd.* v. *Neale* [1898] 2 Q. B. 487.

(*m*) (1871) L. R. 6 Ex. 70.

(*n*) [1901] 2 K. B. 215.

gave an oral assurance that they were in good order, and on the faith of it the counterpart was handed over to him. The lease contained no reference to drains. The drains were not in good order and the plaintiff brought an action for damages suffered by him in consequence. It was held that the defendant's representation was a warranty which was collateral to the lease and that an action was maintainable for the breach of it.

Of the same character as the foregoing are those cases where one of the parties is allowed to prove a collateral oral agreement which suspends in a certain event the operation of a written agreement (*o*).

§ 6. Extrinsic Evidence to invalidate the Transaction embodied in the Document.

All the foregoing cases in which oral evidence is admitted have this common characteristic, that they are cases in which the instrument is not reprobated, but relied on and affirmed, the object of the oral evidence being to explain its terms and interpret them correctly. They must accordingly be distinguished from numerous other cases where oral evidence is admitted, as for the purpose of rectifying the instrument, or for the purpose of showing that it is invalid (as by reason of illegal consideration) or voidable (as for fraud or misrepresentation), or that, although valid, it has been discharged by matter subsequent. It is obvious that none of these cases form exceptions to the rule excluding oral evidence of the transaction recorded and constituted by the document, but are matters belonging to other branches of the law and principally to the law of contract.

(*o*) *Wallis* v. *Littell* (1861) 31 L. J. C. P. 100. Contrast with these the cases where oral matter is admitted in evidence for the purpose of showing that there never was any complete agreement at all. *Pym* v. *Campbell* (1856) 6 E. & B. 370; *Pattle* v. *Hornibrook* [1897] 1 Ch. 25.

Part III.

THE MEDIA OF PROOF.

Inspection or View:
(i) *View during Trial.*
(ii) *View before Trial—*
(a) *In Civil Cases.*
(b) *In Criminal Cases.*

HAVING in the last Part of this work defined and illustrated the Relevant Facts, we proceed to discuss the various means by which those facts may be brought to the knowledge of the court.

The most direct way of all in which relevant facts can be brought to the cognizance of the judge and jury is by Inspection or View. It is obvious that where this is available it must be a better means of knowledge than any of those forms of testimony which are the subject of this Part, in so far as the subject-matter of inspection is by itself completely intelligible upon the mere view; and even where testimony is required for the purpose of explanation, inspection will still be on many points the most direct mode of gaining information. Where therefore the issue relates to some physical object, the identity, quality or condition of which is relevant, and which can be inspected, this means of information is frequently resorted to (*a*).

With regard to portable objects it is a common practice

(*a*) As to relation between inspection and evidence, see *London General Omnibus Co.* v. *Lavell* (1900) 83 L. T. N. S. 453.

for the party who has the possession of them to bring them into court where the judge and jury may inspect them during the course of the proceedings. Every one is familiar with this kind of evidence: the production in court of the weapon with which injury has been inflicted on person or property, of articles alleged to have been stolen or damaged, of goods alleged to be inferior to warranty, and the like.

With regard to all objects which either cannot be, or for some good reason are not in fact brought into court, a view may be had out of court, either during the trial itself, or in certain cases at some prior stage of the proceedings.

(i) *View during Trial.*—During the trial the judge has jurisdiction by the common law, both in civil and criminal proceedings, to adjourn the court for the purpose of a view by the jury of any property or thing of which it is reasonable and convenient in all the circumstances of the case that a view should be had (*b*). Generally the most convenient time for such a view is after the questions in issue have been explained to the jury, but before the evidence has been given; but it may be lawfully had at any time before verdict, and may therefore be had even after the summing-up of the judge (*c*).

(ii) *View before Trial.*—By the common law the court had no power to order an inspection before trial, but the jurisdiction has now been conferred upon it in certain cases by statute and rules of court.

(a) In Civil cases in the Supreme Court ample powers for procuring inspection by the judge and jury before trial, are now supplied by the combined effect of the following rules of Order L:—

Rule 3. It shall be lawful for the court or a judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the detention, preservation, or inspection

(*b*) *R.* v. *Whalley* (1847) 2 C. & K. 376; *R.* v. *Martin* (1872) L. R. 1 C. C. R. 378.

(*c*) *R.* v. *Martin* (1872) L. R. 1 C. C. R. 378.

of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid, to authorise any persons to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid to authorise any sample to be taken, or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

Rule 4. It shall be lawful for any judge, by whom any cause or matter may be heard or tried with or without a jury, or before whom any cause or matter may be brought by way of appeal, to inspect any property or thing concerning which any question may arise therein.

Rule 5. The provisions of Rule 3 of this Order shall apply to inspection by a jury, and in such case the court or a judge may make all such orders upon the sheriff or other person as may be necessary to procure the attendance of a special or common jury at such time and place and in such manner as they or he may think fit.

Notwithstanding the wide terms of Order L the court has no power to order a jury summoned from one county to hold any view or inspection which would require their presence in another county (*d*); that can only be effected by private arrangement with the consent of all persons concerned, including the jurors themselves.

The effect of Rules 48 and 55c of Order XXXVI, read together, is to enact that—

Where any cause or matter or any question or issue of fact therein is referred to an officer of the court or to a special referee or arbitrator . . . . he may, subject to the order of the court or a judge, hold the trial at or adjourn it to any place which he may deem most convenient, and have any inspection or view, either by himself or with his assessors (if any), which he may deem expedient for the better disposal of the controversy before him.

The provisions as to the same matter in the County Court Rules, 1903 and 1904, are in somewhat fuller terms.

Order XII provides:—

Rule 3. The court may upon the application of any party to an action or matter, and upon such terms as may be just, make any order for the

(*d*) *Stoke* v. *Robinson* (1889) 6 T. L. R. 31.

detention, preservation, inspection, *surveying*, *measuring*, or *weighing* of any property or thing, being the subject of such action or matter, or as to which any question may arise therein, and may for all or any of the purposes aforesaid authorise any persons to enter upon or into any land or building in the possession of any party to such action or matter, and authorise any samples to be taken, or any observation, *plan*, or *model* to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

Rule 4. Where an order is made for inspecting, surveying, measuring, weighing, or making any experiment, or for taking any sample, or making any plan or model, by any person to be named therein, such order may include an order for the registrar or some other person to be named therein, to examine upon oath and take the deposition of the person so named, as to such measure, weight, or inspection, or the correctness of such survey, or the result of such experiment, or the fairness of such samples, or the accuracy of such plan or model, and such order may also empower any or either party to give the deposition so taken in evidence upon any trial or proceeding.

And Order XXI provides:

Rule 17. The judge may in his discretion inspect, or order the jury to inspect, any property or thing concerning which any question may arise in any action or matter.

Similar powers to those given by Order L were conferred by the Admiralty Act, 1861 (*e*), and the Patents, Designs and Trade Marks Act, 1883 (*f*).

(b) In Criminal cases the powers of the court are much more limited. By sect. 23 of 6 Geo. 4 c. 50 it is enacted that—

Where in any case, either civil (*g*) or criminal, or on any penal statute, depending in any of the said courts of record at Westminster (*h*),

(*e*) 24 Vict. c. 10, s. 18. As to the operation of rules in force in the Admiralty Court at the time of the coming into force of the Judicature Acts, see Jud. Act, 1875, s. 18. As to the practice in that court in respect of view and inspection, see Admiralty Practice by Williams & Bruce, 3rd ed. 1902, p. 445.

(*f*) 46 & 47 Vict. c. 57, s. 30.

(*g*) So far as this section relates to civil proceedings it is superseded in practice by the rules of Order L cited in the text.

(*h*) The jurisdiction of these courts is now, by virtue of the Judicature Acts, vested in the Supreme Court.

it shall appear to any of the respective courts, or to any judge thereof, in vacation, that it will be proper and necessary that some of the jurors who are to try the issues in such case should have the view of the place in question, in order to their better understanding the evidence that may be given upon the trial of such issues, in every such case such court, or any judge thereof in vacation, may order a rule to be drawn up containing the usual terms, and also requiring, if such court or judge shall so think fit, the party applying for the view to deposit in the hands of the under-sheriff a sum of money to be named in the rule for payment of the expenses of the view.

The section further provided that the rule should be followed by the issue of a special writ to secure the attendance of the jurors to view the place in question; but this provision has been repealed, and the procedure relating to the view is now regulated by Rules 159 and 252 (q) of the Crown Office Rules, 1886. These provisions are however of a very limited character, as they do not extend to courts of assize (*k*), but apply only to proceedings on the Crown side of the King's Bench Division. Moreover they authorise only the inspection of such property as answers the description of "the place in question" (*l*), and their chief application therefore is to indictments for nuisance.

(*k*) As to the removal of indictments into the King's Bench Division for the purpose of obtaining an order for a view, see C. O. R. XXIX; and Short & Mellor's Cro. Pr. pp. 94, 95.

(*l*) *Stones* v. *Menham* (1848) 2 Ex. 382.

CHAPTER I.

DIRECT ORAL EVIDENCE.

§ 1. *The Witness must be Competent.*
(i) *Mental Incompetency.*
(a) *Childhood.*
(b) *Insanity.*
(c) *Deafness and Dumbness.*
(d) *Illness.*
(e) *Drunkenness.*
(ii) *Incompetency from Interest.*
(a) *Civil Proceedings.*
(b) *Criminal Proceedings.*
§ 2. *The Evidence must be on Oath or Affirmation.*
§ 3. *The Evidence must be Direct and must be given before the Court.*

All Relevant Facts, except such as can be viewed by the judge and jury in the manner just described, must obviously be brought to the cognizance of the court by means of some form of statement, oral or documentary; and the law has accordingly defined the kinds of statements admissible for this purpose. The various forms of narrative or record so defined are generally referred to in this work as Media of Proof, for the reasons stated in the Introduction, where the general relations to each other of these different forms of testimony are discussed (*a*). The rules which define them are all based on the principle that the Best Evidence must be given that the nature of the case will admit; in other words, they are all devised to secure, as far as may be possible, the credibility of the information conveyed to the court.

The principal of these media of proof is Direct Oral Evidence, that is, the direct evidence of a competent witness given on oath or affirmation in open court (*b*). It will be

(*a*) See Introduction, pp. 5—10.

(*b*) *Outram* v. *Morewood* (1793) 5 T. R. 121, 123; *Berkeley Peerage Case* (1811) 4 Camp. 401, 414; *Wright* v. *Doe* (1837) 7 A. & E. 313, 384; *May* v. *Taylor* (1843) 6 M. & G. 261, 265; *Polini* v. *Gray* (1879) 12 Ch. D. 411, 425.

convenient to consider separately the three requisites comprised in this definition, namely, Competency, the Oath or affirmation, and the condition that the evidence must be Direct and given in open court.

§ 1.—The Witness must be Competent.

Incompetency denotes the legal incapacity to give evidence. The grounds of incompetency were formerly very numerous, and many circumstances which are now regarded as affecting only the weight of a witness's testimony were treated as reasons for disqualifying him altogether (*c*). But all the grounds of incompetency which require notice in a modern treatise may be grouped under two heads: (i) those due to Mental Incapacity whether permanent or temporary; and (ii) those which are due to the legal doctrine of Interest or bias. With regard to the first class, founded chiefly on obvious natural considerations, the common law has been little modified by legislation. The second class, being due to a doctrine that seems now technical and artificial, has been almost entirely abolished by modern legislation (*d*); but such portion of it as remains cannot be rightly understood without some knowledge of the earlier state of the law.

(i) *Mental Incompetency.*—Persons whose understanding is too feeble for any reliance to be reasonably placed on any evidence they may give are incompetent to testify. Such are or may be children of tender years, and persons who are insane, deaf and dumb, ill, or drunk.

(a) *Childhood.*—It was formerly attempted to fix the age at which children should be deemed competent to give evidence, but it is now settled that their competency depends

(*c*) Gilb. Ev. 4th ed. 119—144; cp. *Berkeley Peerage Case* (1811) 4 Camp. 401, 415; *Jacobs* v. *Layborn* (1843) 11 M. & W. 685, 691.

(*d*) See below, pp. 128—130.

not on their age, but on the degree of intelligence they possess. In other words their admissibility as witnesses depends on the question whether they show reasonable intelligence and a due appreciation of the duty of speaking the truth (*e*). The mode in which this is tested is specially referred to on a later page (*f*).

(b) *Insanity.*—Persons who suffer from insanity are not necessarily incompetent. Whether they are fit to testify depends on the character and extent of the insanity. An insane person may be quite competent to testify during what are called lucid intervals (*g*); and even during the continuance of the insanity, if it be such as not to render his testimony wholly untrustworthy (*h*). His mental condition should therefore be ascertained before he is allowed to testify (*i*). In the leading case of *R.* v. *Hill* (*j*), the prisoner, an attendant in a lunatic asylum, was indicted for the manslaughter of one of the inmates under his care. The prosecution tendered another inmate of the asylum, named Donelly, as a witness of the transaction. Evidence was called on both sides with regard to the mental condition of Donelly before he was admitted as a witness. It appeared that he had a settled delusion that he was attended by thousands of spirits who entered his body and came round his head and were incessantly speaking to him. He gave a connected and rational account of the transaction he was called to prove, although on one point at any rate, namely the date of the occurrence, he drew a distinction between his own recollection and the suggestions of the spirits, who, he

(*e*) *R.* v. *Brasier* (1779) 1 Lea. C. C. 199; *R.* v. *Holmes* (1861) 2 F. & F. 788.

(*f*) See pp. 124, 125.

(*g*) Com. Dig. Testmoigne A. I.

(*h*) *Att.-Gen.* v. *Hitchcock* (1847) 1 Ex. 91, 95; *R.* v. *Hill* (1851) 2 Den. C. C. 254.

(*i*) *Spittle* v. *Walton* (1871) 11 Eq. 420.

(*j*) (1851) 2 Den. C. C. 254.

said, assisted his memory. It was held by the court that his testimony had been rightly admitted.

(c) *Deafness and Dumbness.*—Persons deaf and dumb from birth were formerly presumed to be idiots until the contrary was shown (*k*); but now it is simply a question, as in other cases, to be decided by the judge, whether they have sufficient intelligence, as well as capacity to communicate their thoughts to others, to justify the reception of their evidence. Their evidence may be given either by means of signs made to some person sworn to interpret them to the court, or by means of writing, as the judge may direct (*l*). A person who is only deaf or only dumb is of course competent to testify, subject to the like conditions.

(d) *Illness.*—It is clear that anyone may be rendered temporarily incompetent by illness.

(e) *Drunkenness.*—The same is true of drunkenness.

The question whether a witness is mentally competent or not, like all questions of the admissibility of evidence, is for the judge alone. For the decision of this question he may examine the proposed witness himself and also hear evidence (*m*). This inquiry is called the examination on the *voire dire* (*n*). Formerly it was necessary that it should be held before the witness was sworn and had begun to give evidence upon the issue, but it is now settled that it may be held at any stage of his examination whenever disqualification is first suspected (*o*). And even although the witness should have been examined on the *voire dire* before the com-

(*k*) Hale, P. C. 34.

(*l*) *R.* v. *Ruston* (1786) 1 Lea. C. C. 408; *Morrison* v. *Lennard* (1827) 3 C. & P. 127; *R.* v. *Whitehead* (1866) L. R. 1 C. C. R. 33.

(*m*) *Jacobs* v. *Layborn* (1843) 11 M. & W. 685, 692; *Att.-Gen.* v. *Hitchcock* (1847) 1 Ex. 91, 95; *R.* v. *Hill* (1851) 2 Den. C. C. 254.

(*n*) *I.e.*, "To speak truly." *Voire* is derived through the French from the Latin *vere* or *vera*.

(*o*) *Beeching* v. *Gower* (1816) Holt, N. P. C. 313; *Jacobs* v. *Layborn* (1843) 11 M. & W. 685.

mencement of his evidence, and held competent, yet if it is subsequently discovered that he is in fact incompetent, his evidence will be struck out (*p*).

The test of mental capacity applied, especially in the case of children, has most frequently been the capacity of the proposed witness to understand the nature of an oath (*q*). The degree of intelligence necessary for this purpose is probably somewhat greater than that requisite for giving such testimony as is worthy of consideration (*r*); at any rate it has generally been deemed a sufficient test of the capacity to testify. The presence of the two distinct conditions, general mental competency, and the religious sanction of the oath—which is discussed below (*s*) but may be usefully referred to here—are thus conveniently tested by a single inquiry. And hence it is not the practice to swear a proposed witness for his examination on the *voire dire* (*t*).

(ii) *Incompetency from Interest.*—This ground of incom-

(*p*) *R.* v. *Whitehead* (1866) L. R. 1 C. C. R. 33.

(*q*) *R.* v. *Brasier* (1779) 1 Lea. C. C. 199; *R.* v. *Holmes* (1861) 2 F. & F. 788. In the former case the judges were unanimously of opinion that an infant under the age of seven years might give evidence provided it appeared to possess a sufficient knowledge of the nature and consequences of an oath, the admissibility of such witnesses depending on the sense and reason they entertain of the danger and impiety of falsehood. In the latter case Wightman J. admitted the evidence of a child of six years, who being asked by the judge whether it was a good thing or a bad thing to tell a lie, answered with hesitation, "A bad thing"; and he expressed the opinion that the understanding of the "nature and obligation of an oath" was a complicated question which nine out of ten children could not answer, and the answering of which would not really advance the credibility of such testimony. This seems to be accepted as the reasonable mode of applying in these days the doctrine of *R.* v. *Brasier*. But the nice questions as to the precise degree of belief required are of far less importance now than formerly, since by statute children are allowed in so many cases to give unsworn testimony. See below, pp. 141, 142.

(*r*) This seems to be implied in the provisions contained in sect. 4 of the Criminal Law Amendment Act, 1885, 48 & 49 Vict. c. 69, and in sect. 15 of the Prevention of Cruelty to Children Act, 1904, the provisions of which are set out in full at pp. 141, 142, below.

(*s*) See pp. 136 *seq.*

(*t*) *Jacobs* v. *Layborn* (1843) 11 M. & W. 685, 690.

petency was once far-reaching in its effects; but successive enactments of the legislature have now gone a long way towards abolishing it, inasmuch as in many if not most cases it excluded what is now recognised as the most direct and important testimony of the facts in issue. Moreover, so far as the rules founded on it still operate, they may be said to have no longer for their motive or justification the belief that personal interest and bias render a witness unfit to testify, but rather a chivalrous instinct of protection, which is averse to allowing a prisoner to be exposed to cross-examination against his will or a husband or wife to be compelled to testify against each other. The existing state of the law is summed up below (*u*), but in order to rightly appreciate it, it is necessary first to understand the scope of the original doctrine and to follow the successive modifications it has undergone.

By the common law all persons convicted of infamous crimes were incompetent to testify (*x*). Also any person interested in the result of the proceedings (*y*). By interest was intended not a mere sentiment of partiality, but any certain advantage or disadvantage recognised by the law as resulting from the determination of the proceedings. Thus one who had guaranteed the payment of the costs of one of the parties (*z*), or who had agreed with the plaintiff or defendant for a lease of the premises sought to be recovered in the proceedings (*a*), or who was in *pari jure* with one of the litigants, so that the judgment could be given in evidence for or against himself in future proceedings (*b*), was deemed a person interested. But the most important application of this principle was this, that

(*u*) At pp. 130—136.

(*x*) Viner's Abr. Evidence, p. 27. *Quære* as to persons under sentence of death. See *R.* v. *Webb* (1867) 11 Cox, 133. Cf. p. 197 below, note (*o*).

(*y*) Gilb. Ev. 4th ed. 119; Bac. Abr. Ev. (13).

(*z*) *Jacobs* v. *Layborn* (1843) 11 M. & W. 685.

(*a*) Gilb. Ev. 4th ed. 122.

(*b*) *Bent* v. *Baker* (1789) 3 T. R. 27, 32; *Smith* v. *Prager* (1796) 7 T. R. 60; *Fowler* v. *Port* (1837) 7 C. & P. 792.

every party to a cause, whether civil or criminal, was, until the moment when the verdict or judgment had passed for or against him, disqualified by his interest, and was neither competent nor compellable to give evidence for or against himself (*c*). Nor could a party give evidence for or against any co-plaintiff or co-defendant when their cases were tried together (*d*). When this was not the case, as where two defendants to a joint indictment were tried separately, the rule did not apply, because the verdict or judgment upon the first trial could not be pleaded or given in evidence at the second (*e*). And an accomplice was never deemed to be disqualified as such by interest (*f*). So if several defendants jointly indicted for some offence were tried together, and one of them was acquitted (*g*), or pleaded guilty (*h*), before the termination of the proceedings against the others, he at once became competent to testify for or against the others, since he had no longer any interest in the result of the proceedings. The same result followed if, in lieu of a verdict of acquittal being entered, the Attorney-General entered a *nolle prosequi* (*i*).

By the same rule it was held that the husband or wife of a party was, from the identity of their interests, neither competent nor compellable to give evidence for or against such party (*k*), or the party's co-plaintiff or co-defendant (*l*).

(*c*) *R.* v. *Woburn* (1808) 10 East, 395; *Worrall* v. *Jones* (1831) 7 Bing. 395.

(*d*) *R.* v. *Payne* (1872) L. R. 1 C. C. R. 349.

(*e*) *R.* v. *Payne* (1872) L. R. 1 C. C. R. 349, 354; *R.* v. *Bradlaugh* (1883) 15 Cox, 217; cp. *Winsor* v. *R.* (1866) L. R. 1 Q. B. 390.

(*f*) Gilb. Ev. 4th ed. 136; *R.* v. *Wilkes* (1836) 7 C. & P. 272; *R.* v. *Stubbs* (1855) Dears. C. C. 555, 558.

(*g*) *R.* v. *Paulin* (1824) R. & M. 128; *R.* v. *Rowland* (1826) *ibid.* 401; *R.* v. *O'Donnell* (1857) 7 Cox, 337, 341, 342.

(*h*) *R.* v. *Hinks* (1845) 1 Den. C. C. 84; *R.* v. *Gallagher* (1875) 13 Cox, 61.

(*i*) Archb. Cr. Pl. 20th ed. 318.

(*k*) Bac. Abr. Ev. A. 1; Gilb. Ev. 4th ed. 133; *O'Connor* v. *Majoribanks* (1842) 4 M. & G. 435.

(*l*) *Hawkesworth* v. *Showler* (1843) 12 M. & W. 45; *R.* v. *Thompson* (1872) L. R. 1 C. C. R. 377.

An exception was of necessity admitted in the cases of offences committed by either husband or wife against the person or liberty of the other (*m*). But no such exception was allowed in the cases of offences committed by one against the property of the other (*n*), or in the case of an information against the husband for neglecting to maintain his wife (*o*).

The prosecutor in criminal proceedings (inasmuch as the Crown, and not he, is in the position of plaintiff) was not disqualified from giving evidence, save in those cases where the proceedings might result in some advantage to himself, such as the restitution of property or a share in a penalty (*p*).

These disqualifications however have been, by a number of modern statutes, largely removed; so that in civil proceedings there is hardly a trace of them left, while in criminal proceedings their operation, so far as it remains, is reduced to something rather in the nature of a privilege than a disqualification, as already indicated (*r*). The legislature abolished successively the incompetency of the following persons, namely: numerous classes of persons standing *in pari jure* with the parties (*s*); all persons disqualified by crime or by interest, save the parties on the record or persons on whose behalf the proceedings are taken or defended, and their husbands and wives (*t*); the parties to all civil proceedings, and the persons on whose behalf such proceedings are instituted, except in the case of proceedings instituted in conse-

(*m*) Hale, P. C. vol. i. p. 301; B. N. P. 286, 287; *R.* v. *Jellyman* (1838) 8 C. & P. 604.

(*n*) Gilb. Ev. 4th ed. 123, 124.

(*o*) *Reeve* v. *Wood* (1864) 34 L. J. M. C. 15. In that case the wife was tendered as a witness on behalf of the prosecution against her husband, but was rejected, and the court upheld the rejection.

(*p*) Phill. Ev. 10th ed. vol. i. pp. 47—49.

(*r*) At p. 126.

(*s*) 54 Geo. 3, c. 170, s. 9; 3 & 4 Will. 4, c. 42, ss. 26, 27; 3 & 4 Vict. c. 26.

(*t*) 6 & 7 Vict. c. 85, s. 1.

quence of adultery or for breach of promise of marriage (*u*); the husbands and wives of parties to all civil proceedings and of persons on whose behalf such proceedings are brought or defended, except in the case of proceedings instituted in consequence of adultery (*x*); the parties to actions for breach of promise of marriage; and husbands or wives in proceedings to which they are parties instituted in consequence of adultery (*y*), and in proceedings whether civil or criminal to which they are parties for the protection of the property of either of them taken under the Married Women's Property Acts of 1882 and 1884 (*z*). Besides these enactments, a number of others, passed between the years 1872 and 1898 and relating to criminal proceedings for particular offences, enabled the defendant, and the defendant's husband or wife, to give evidence therein. By some of these statutes the defendant and the defendant's husband or wife were rendered both competent and compellable to give evidence (as under the Evidence Act, 1877 (*a*), in prosecutions for non-repair of a highway or bridge or nuisance to highway, river or bridge, and other prosecutions for the purpose of enforcing any civil right only); in others competent only; and in a few instances a new distinction was introduced by rendering the husband

(*u*) 14 & 15 Vict. c. 99 ss. 1—3; *Barbat* v. *Allen* (1852) 7 Ex. 609; *Stapleton* v. *Croft* (1852) 18 Q. B. 367; *Blackborn* v. *Blackborn* (1868) L. R. 1 P. & D. 563; cp. *Att.-Gen.* v. *Radloff* (1854) 10 Ex. 84; and 28 & 29 Vict. c. 104 s. 34 as to Revenue proceedings.

(*x*) 16 & 17 Vict. c. 83. By sect. 43 of 20 & 21 Vict. c. 85 a discretionary power was given to the judge to order the attendance and examination of the petitioner in a matrimonial cause, but the petitioner was not bound to answer any question tending to show that he or she had been guilty of adultery. And by 22 & 23 Vict. c. 61 s. 6 it was enacted that on any petition by a wife for divorce by reason of her husband's adultery coupled with either cruelty or desertion, the husband and wife respectively should be competent and compellable to give evidence of or relating to such cruelty or desertion. As to county courts cp. 9 & 10 Vict. c. 95 s. 83.

(*y*) 32 & 33 Vict. c. 68 ss. 1, 2, 3.

(*z*) 45 & 46 Vict. c. 75 ss. 12, 16; 47 Vict. c. 14 s. 1; and see *R.* v. *Brittleton* (1884) 12 Q. B. D. 266.

(*a*) 40 Vict. c. 14.

or wife of the defendant competent—and apparently compellable also—not at his or her own will, but at the option of such defendant.

In the first edition of this work a list of these enactments was here set forth in the text, but this seems no longer necessary, having regard to the wide general provisions of the Criminal Evidence Act, 1898 (*a*).

That Act introduced the great modern change of allowing every person charged with an offence, and the wife or husband as the case may be of the person so charged, to be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person (*b*), at the same time providing that a person so charged shall not be called as a witness for the defence except upon his own application (*c*).

The Act further provides that the wife or husband of the person charged shall not be so called as a witness except upon the application of the person charged, save in cases where he is charged with an offence against any of the statutes mentioned in the Schedule to the Act. In those cases the wife or husband of the person charged may be called as a witness either for the prosecution or defence and without the consent of the person charged (*d*). But nothing in the Act is to affect a case where the wife or husband of a person charged may at common law be called as a witness without the consent of the person charged (*e*) or to affect the Evidence Act, 1877, just mentioned (*f*).

The present state of the law therefore with regard to Incompetency from Interest is as follows :—

(a) *Civil Proceedings.*—In actions for breach of promise of

(*a*) See Appendix B, at p. 468 below.
(*b*) *Ibid.* s. 1.
(*c*) *Ibid.* s. 1 (a).
(*d*) *Ibid.* ss. 1 (c) and 4 (1).
(*e*) *Ibid.* s. 4 (2). For these see p. 128 above.
(*f*) *Ibid.* s. 6 (1). See pp. 129, 131, for this Act.

marriage the parties are competent but not compellable to give evidence (*g*). In proceedings instituted in consequence of adultery the parties and the husbands and wives of such parties are competent but not compellable (*h*). In all other cases all persons whatsoever are in civil cases both competent and compellable to give evidence.

(b) *Criminal Proceedings.*—In regard to criminal proceedings the law is still somewhat complex. It stands thus:—

1. In the cases mentioned in the Evidence Act, 1877 (*i*), the defendant is made an admissible witness and compellable to give evidence; and so also the wife or husband of the defendant. This seems to imply that they are competent and compellable to give evidence either for the prosecution or the defence. This Act applies to indictments or other proceedings

(*g*) By virtue of the common law as modified by sect. 2 of 32 & 33 Vict. c. 68, which is as follows:—"The parties to any action for breach of promise of marriage shall be competent to give evidence in such action: provided always that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise."

(*h*) By virtue of the common law as modified by sect. 3 of 32 & 33 Vict. c. 68, which is as follows:—"The parties to any proceeding instituted in consequence of adultery and the husbands and wives of such parties shall be competent to give evidence in such proceeding: provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

Proceedings instituted in consequence of adultery do not comprise proceedings by guardians of the poor against a parent for an order of maintenance though resisted on the ground of alleged illegitimacy of the child (*Guardians of Poor of Nottingham* v. *Tomkinson* (1879) 4 C. P. D. 343); nor an action by a divorced husband for the execution of trusts of the marriage settlement, although the legitimacy of certain of the children is one of the issues. *Burnaby* v. *Baillie* (1889) 42 Ch. D. 282. Lopes J. in the former of these cases (at p. 350) expressed the view that the sections cited in this and the preceding note had rendered the parties and their husbands and wives compellable as well as competent witnesses in the cases therein specified. But it is submitted that this *obiter dictum* is erroneous. As to privilege in relation to adultery, see further below at pp. 286—290.

(*i*) 40 Vict. c. 14.

for non-repair of any public highway or bridge, or for a nuisance to any public highway, river or bridge, and to any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only.

2. In proceedings for offences under the Enactments Scheduled to the Criminal Evidence Act, 1898 (*k*), by virtue of sect. 4 of that Act the wife or husband of the defendant may be called as a witness either for the prosecution or the defence without the consent of the defendant, while the defendant is by virtue of sect. 1 a competent witness for the defence at every stage of the proceedings (*l*), but remains incompetent and therefore not compellable to give evidence for the prosecution (*m*). The enactments so scheduled (*n*) and the offences and proceedings to which they relate are the following:—

The Vagrancy Act, 1824 (*o*)	5 Geo. 4 c. 83, part of sect. 3.	The enactment punishing a man for neglecting to maintain or deserting his wife or any of his family.
Offences against the Person Act, 1861 ..	24 & 25 Vict. c. 100	
	s. 48.	Rape.
	s. 50.	Carnal knowledge of girl under 10.
	s. 51.	Carnal knowledge of girl above 10 and under 12.
	s. 52.	Indecent assault upon a female.
	ss. 53, 54, 55.	Abductions.

(*k*) See Appendix B, p. 468.

(*l*) This does not of course include the inquiry before the grand jury, as they have no jurisdiction to consider the defence: *R.* v. *Rhodes* [1899] 1 Q. B. 77. See sect. 4, p. 134 below.

(*m*) That is, by virtue of the common law; see as to this at p. 127.

(*n*) Except the Prevention of Cruelty to Children Act, 1894, which was repealed and superseded by that of 1904, for which see the next section of this statement.

(*o*) Also the Poor Law (Scotland) Act, 1845, 8 & 9 Vict. c. 83 s. 80, which contains a similar enactment. As to the English Act, see *Reeve* v. *Wood* (1864) 34 L. J. M. C. 15.

Married Women's Property Act, 1882....	45 & 46 Vict. c. 75 ss. 12 and 16.	Criminal proceedings by wife against husband or husband against wife or by husband or wife against any other person for the protection and security of her or his own separate property.
Criminal Law Amendment Act, 1885....	48 & 49 Vict. c. 69 s. 2.	Procuration of girl or woman under 21 not being a prostitute or of known immoral character to have unlawful carnal connection.
	s. 3.	Procuration by threats, fraud or drugs.
	s. 4.	Carnal knowledge of girl under 13, or attempt.
	s. 5.	Carnal knowledge of girl of 13 and under 16, or of imbecile; and attempt.
	s. 6.	Householder knowingly permitting defilement.
	s. 7.	Abduction of unmarried girl under 18 with view to defilement.
	s. 8.	Unlawful detention with view to carnal knowledge.
	s. 11.	Outrages on decency.
	s. 13.	Keeping of brothel.

3. In proceedings for offences under the Prevention of Cruelty to Children Act, 1904 (*p*), or for any of the offences mentioned in the First Schedule thereto, the defendant "shall be competent but not compellable to give evidence, and the wife or husband of such person may be required to attend to give evidence as an ordinary witness in the case, and shall be competent but not compellable to give evidence." The enactments so scheduled and the offences to which they relate are the following:—

Offences against the Person Act, 1861 (*as amended by s.* 19 *of* 48 & 49 *Vict. c.* 69).	24 & 25 Vict. c. 100	
	s. 27.	Exposure of children.
	s. 55.	Abduction of girl under 16.
	s. 56.	Child stealing, &c.
		The following offences against a child under 16:—
	s. 5.	Manslaughter.
	s. 42.	Common assault or battery.
	s. 43.	Aggravated assault or battery.
	s. 52.	Indecent assaults upon a female.
	s. 62.	Assault or attempt to commit unnatural offence.

(*p*) 4 Edw. 7 c. 15. See note (*n*) on p. 132.

Criminal Law Amendment Act, 1885	48 & 49 Vict. c. 69 s. 11.	Acts of gross indecency, &c.
Dangerous Performances Acts, 1879 and 1897.....	42 & 43 Vict. c. 34. 60 & 61 Vict. c. 52.	Employment of children and young persons in dangerous performances.

And any other offence involving bodily injury to a child under the age of sixteen years.

4. In all other cases the person charged with an offence is neither competent nor compellable to give evidence for the prosecution; but by virtue of sect. 1 of the Criminal Evidence Act, 1898 (*q*), is a competent witness for the defence at every stage of the proceedings (*r*), provided that he shall not be called as a witness except upon his own application. And the wife or husband, as the case may be, of the person charged also remains incompetent to give evidence for the prosecution (*s*), but is a competent witness for the defence at every stage of the proceedings (*r*), provided that such wife or husband shall not be so called as a witness except upon the application of the person charged (*t*).

5. By sect. 1 of the Criminal Evidence Act, 1898 (*q*), the above rules apply whether the person charged is charged solely or jointly with another. And hence where A and B are jointly indicted, A is competent not only to give evidence for the defence on behalf of himself, but also on behalf of B, though in each case it is a condition precedent that A should himself apply to be so called. In the same way A's wife or husband may also give evidence for the defence for B, provided that A has applied that she or he may be so called. But B could not compel either A or A's wife or husband to give evidence for him, unless A should first plead guilty or be acquitted or a *nolle prosequi* should be entered

(*q*) See Appendix B, p. 468.

(*r*) This does not, of course, include the inquiry before the grand jury, since it is not within their jurisdiction to consider the defence: *R.* v. *Rhodes*, [1899] 1 Q. B. 77.

(*s*) As to the privilege reserved by the section for communications between husband and wife during coverture, see p. 286.

(*t*) See sect. 1 (*c*) of the Act.

against him, or there should be a separate trial of A and B (*u*). And A and A's wife or husband remain incompetent to give evidence for the prosecution as against B, save in the events just mentioned.

6. The prosecutor and the prosecutor's wife or husband (*x*), and any accomplice or accessory of the defendant, or his or her wife or husband (*y*), not being jointly indicted and tried with him, remain entitled to testify on either side as before the Criminal Evidence Act, 1898. Indeed it would seem that the only cases of incompetency now remaining—and they, it will be noticed, are only cases of partial incompetency —are those mentioned in the five preceding paragraphs (*z*). As to the various statutes passed between 1872 and 1898 which dealt with the competency of the defendant and the defendant's wife or husband, these need no longer (save the Act of 1877) be referred to in this connection, as by sect. 6 of the Criminal Evidence Act, 1898 (*a*), it is enacted that the Act shall apply to all criminal proceedings notwithstanding any enactment in force at the commencement of this Act, except that nothing in the Act is to affect the Evidence Act, 1877 (*b*).

The old doctrine of incompetency from interest having been thus restricted in its operation, and what remains of it resting in most cases, as already stated, rather on considerations of humanity than veracity, it has come to bear in some respects considerable resemblance to the subject of privilege; and hence it is well to refer to Chapter XIV of Part III for the purpose of comparing these two heads of the law of evidence (*c*). The difference which still distinguishes them

(*u*) See p. 127.

(*x*) See p. 128.

(*y*) See p. 127.

(*z*) See however the doubts as to the competency of a convict awaiting execution of capital sentence, at p. 126, note (*x*).

(*a*) See Appendix B, p. 468. But see *R.* v. *Brazil* (1899) 63 J. P. p. 138.

(*b*) See pp. 129, 131, 132.

(*c*) See below, pp. 269—307.

is this, that privilege assumes a witness who is competent and compellable to give evidence generally, and who can only obtain exemption from answering questions addressed to some particular matter, the subject of the privilege, by making express claim to the privilege; while incompetency, even in its present reduced form, assumes that the witness (*i.e.* the prisoner or the prisoner's wife or husband as the case may be) is incompetent to give evidence in general, and it is only on the express claim of the prisoner that such disability can be relaxed, and then (save in certain defined cases) only for the purpose of giving evidence for the defence.

§ 2. The Evidence must be on Oath or Affirmation.

The second requisite of oral evidence is that it must be given upon Oath or, where an affirmation may be substituted, upon Affirmation (*d*).

The oath of a witness consists of a solemn undertaking and appeal; an undertaking to testify truly, and an appeal to God for His favour or displeasure according as the witness keeps or breaks his word (*e*). It is not an exclusively Christian ceremony, nor is it even essential that there should be a belief in a future state of rewards and punishments; it is only necessary that the witness should believe in a God who will reward and punish men according to their deserts (*f*). Hence from very early times persons not of the Christian faith have been sworn to give evidence in our courts. And since the forms of oaths have always differed in different

(*d*) *R.* v. *Brasier* (1779) 1 Lea. C. C. 199; *Wright* v. *Doe* (1837) 7 A. & E. 313, 384.

(*e*) *Omichund* v. *Barker* (1745) 1 Sm. L. C.; *R.* v. *White* (1786) 1 Lea. C. C. 430; *The Queen's Case* (1820) 2 B. & B. 285; *Miller* v. *Salomons* (1852) 7 Ex. 475, 515; *Maden* v. *Catanach* (1861) 31 L. J. Ex. 118.

(*f*) *Omichund* v. *Barker, supra.*

countries according to men's various laws and religions, the particular form or ceremony observed in taking the oath is not regarded as an essential part of it. The form may be that of any religion or sect, or even one moulded to comply with the belief of the particular witness, so long as it is one which he regards as binding on his conscience (*g*). This rule of the common law is now confirmed by statute, enacting that in all cases in which an oath may lawfully be and shall have been administered to any person as a witness, such person is bound thereby, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding on him (*h*).

The form and ceremony generally used on swearing a Christian witness are as follows:—the witness, standing uncovered in the witness-box, holds the New Testament in his bare right hand, and the words of the oath are then addressed to him by some officer of the court. In the case of a civil action tried by a judge and jury the words are usually as follows:—

> The evidence that you shall give to the court and jury, touching the matters in question, shall be the truth, the whole truth, and nothing but the truth. So help you God!

In a criminal proceeding they run thus:—

> The evidence you shall give to the court and the jury between our Sovereign Lord the King and the prisoner at the bar (*or* the defendant) shall be the truth, the whole truth, and nothing but the truth. So help you God!

To these words the witness, without speaking, expresses his assent by kissing the book (*i*). Other forms to like effect framed to suit the occasion are used in other proceed-

(*g*) *Omichund* v. *Barker* (1745) 1 Sm. L. C.; *Edmonds* v. *Rowe* (1824) Ry. & M. 77; *Miller* v. *Salomons* (1852) 7 Ex. 475.

(*h*) 1 & 2 Vict. c. 105; cp. *Queen's Case* (1820) 2 B. & B. 284.

(*i*) Whence the form of oath is sometimes called the corporal oath, to distinguish it from other forms, where the witness does not touch the book.

ings (*j*). For those who are not of the Christian faith any form and any ceremony may be employed which the custom of the witness's religion prescribes. Thus Jews are sworn on the Pentateuch with the head covered (*k*), Mahomedans on the Koran (*l*), and Chinamen by a solemn adjuration accompanied by the breaking of a saucer (*m*).

The form of oath usually administered in Scotland consists in the witness standing and holding up his right hand and repeating the words—

> I swear by Almighty God, as I shall answer to God at the great day of judgment, that the evidence that I shall give to the court and jury *touching the matters in question* (*n*) shall be the truth, the whole truth, and nothing but the truth,

without being required to hold or kiss a Bible (*o*). And by sect. 5 of the Oaths Act, 1888 (*p*), it is now enacted that—

> If any person to whom an oath is administered desires to swear with uplifted hand in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question.

By the concluding words is meant that no question shall be asked as to his religious belief (*q*).

Since the taking of an oath implies both the intelligence to understand its meaning, and that belief in its obligation without which it is an idle ceremony, any person is disqualified from validly taking an oath who either from mental defect cannot understand, or from want of religious faith does not

(*j*) See Stringer's Oaths and Affirmations.

(*k*) *Omichund* v. *Barker* (1745) 1 Sm. L. C.

(*l*) *R.* v. *Morgan* (1764) 1 Lea. C. C. 54.

(*m*) *R.* v. *Entrehman* (1842) C. & Mar. 248.

(*n*) In criminal cases substitute for the italics the words "between our Sovereign Lord the King and the prisoner at the bar (*or* the defendant)."

(*o*) *R.* v. *Mildrone* (1786) 1 Lea. C. C. 412; *R.* v. *Walker, ibid.* 498; *Mee* v. *Reid* (1791) N. P. C. 23. See circular letter from the Home Office sent to clerks of justices, &c., dated 31st May, 1893.

(*p*) 51 & 52 Vict. c. 46.

(*q*) See Practice Note, W. N. (1902) 5.

believe in, its effect. The proper time for ascertaining if a person is thus disqualified is by an examination on the *voire dire*, as explained in the last section (*r*). If however the witness has once declared that the oath actually administered is binding on his conscience, no question may be put to him nor may evidence be given to show that there is some other form which would have been more binding upon his conscience; but he will be held bound by his oath (*s*). And if some ground of objection is first discovered after the conclusion of the case, as, for instance, that a witness sworn on the Gospels was in fact a Jew, no objection can be taken to the evidence on this ground, but the witness will be held bound by his oath (*t*).

Such is the general law in regard to the oath. It was found necessary however in the course of time to make special provision for two classes of witnesses for whom it was not suited. On the one hand there were Quakers and other persons, who, although possessing both the intelligence and the belief necessary to render an oath valid, objected on grounds of conscience to the taking of one. On the other hand there were atheists and persons of no recognized religious belief, who refused to admit the sanction of the oath, without which the ceremony is meaningless. For both classes provision was made by various statutes which permit a solemn affirmation to be made in lieu of the oath in some prescribed form suited to the circumstances of the case, and impose the same liabilities as in the case of perjury, if false evidence be wilfully and corruptly given.

As to the first class special provision was first made for Quakers, Moravians (*u*), and Separatists (*v*). This was suc-

(*r*) See pp. 124, 125, above.

(*s*) *Queen's Case* (1820) 2 B. & B. 284; cp. stat. 1 & 2 Vict. c. 105, cited above, p. 137.

(*t*) *Sells* v. *Hoare* (1822) 3 B. & B. 232.

(*u*) 9 Geo. 4 c. 32; 3 & 4 Will. 4 c. 49; 1 & 2 Vict. c. 77.

(*v*) 3 & 4 Will. 4 c. 82.

ceeded by general enactments relating to civil (*x*) and criminal (*y*) proceedings respectively, and providing that if any person called as a witness should be unwilling from alleged conscientious motives to be sworn, the judge or other officer, if satisfied of the sincerity of the objection, should permit such person to make in lieu of oath his solemn affirmation in a certain prescribed form.

As to the second class it was enacted somewhat later that if any person called to give evidence in any court of justice, whether in a civil or criminal proceeding, should object to take an oath, or should be objected to as incompetent to take an oath, such person should, if the presiding judge was satisfied that the taking of an oath would have no binding effect on his conscience, make a solemn promise and declaration in the form prescribed (*z*).

Most of the general enactments mentioned in the last two paragraphs (*a*) are now repealed by the Oaths Act, 1888 (51 & 52 Vict. c. 46), which provides in respect of both classes of cases as follows:—

Sect. 1. Every person, upon objecting to being sworn, and stating as the ground of such objection either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath; and if any person making such affirmation shall wilfully, falsely, and corruptly affirm any matter or thing which, if deposed on oath, would have amounted to wilful and corrupt perjury, he shall be liable to prosecution, indictment, sentence, and punishment in all respects as if he had committed wilful and corrupt perjury.

Sect. 2. Every such affirmation shall be as follows:—"I, A B, do solemnly, sincerely, and truly declare and affirm," and then proceed

(*x*) 17 & 18 Vict. c. 125 s. 20.

(*y*) 24 & 25 Vict. c. 66 s. 1.

(*z*) 32 & 33 Vict. c. 68 s. 4; *Bradlaugh* v. *De Rin*, W. N. (1879) p. 9; 33 & 34 Vict. c. 49 s. 1.

(*a*) *I.e.* all the Acts therein mentioned except those relating to Quakers, Moravians and Separatists.

with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness.

Sect. 3. Where an oath has been duly administered and taken, the fact that the person to whom the same was administered had, at the time of taking such oath, no religious belief, shall not for any purpose affect the validity of such oath.

In two cases special provision has been made for children of tender years who, though incompetent to understand the nature of an oath, yet appear to have sufficient intelligence to give information to the court about the facts in issue. By sect. 4 of the Criminal Law Amendment Act, 1885 (*b*), it is provided that—

Where upon the hearing of a charge under this section (*i.e.* for defiling or attempting to defile a girl under thirteen years of age), the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received, though not given upon oath, if in the opinion of the court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

Provided that no person shall be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution shall be corroborated by some other material evidence in support thereof implicating the accused:

Provided also, that any witness whose evidence has been admitted under this section shall be liable to indictment and punishment for perjury in all respects as if he or she had been sworn.

By sect. 15 of the Prevention of Cruelty to Children Act, 1904 (*c*), the like provision is made in the case of proceedings for offences under that Act. The section is as follows:—

Where in any proceeding against any person for an offence under this Act or for any of the offences mentioned in the First Schedule to this Act, the child in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not in the opinion of the court understand the nature of an oath, the evidence of such child may be received, though not given

(*b*) 48 & 49 Vict. c. 69.

(*c*) 4 Edw. 7 c. 15. See also pp. 261, 262, below.

upon oath, if, in the opinion of the court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and the evidence of such child, though not given on oath, but otherwise taken and reduced into writing in accordance with the provisions of s. 17 of the Indictable Offences Act, 1848, or of s. 14 of the Petty Sessions (Ireland) Act, 1851, or of s. 13 of this Act, shall be deemed to be a deposition within the meaning of those sections respectively: provided that—

(a) A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused; and

(b) Any child whose evidence is received as aforesaid and who shall wilfully give false evidence shall be liable to be indicted and tried for such offence, and on conviction thereof may be adjudged such punishment as is provided for by s. 11 of the Summary Jurisdiction Act, 1879, in the case of juvenile offenders, or in Ireland by s. 4 of the Summary Jurisdiction over Children (Ireland) Act, 1884, in the case of children.

§ 3. The Evidence must be Direct, and must be given before the Court.

The third requisite of oral evidence relates not to the personal qualification of the witness, but to the contents of his evidence. It really comprehends in one proposition two distinct rules.

The first rule is that the witness may not repeat to the court his own previous narratives or statements concerning the relevant facts made to other persons out of court; when he is in the witness-box he must take his mind back directly, so to speak, to the facts he is called to prove, and must give to the court his present recollection of those facts. For instance, this rule will preclude the plaintiff in an action for breach of warranty of the soundness of a horse from saying in the witness-box, "After I bought the horse I rode it home, and when I got home *I told my wife the horse seemed to me to go lame.*" He may prove the lameness, but

he may not prove his own previous statements to another person about it.

The second rule is that the witness must testify only of those relevant facts which he has himself seen or heard or perceived; he may not transmit to the court information which he has received from other persons. This rule is familiarly known in the form of the maxim, *Hearsay is no evidence.* Thus, in the supposed action for breach of warranty, the plaintiff will be precluded from saying in the witness-box, "When I reached home my wife was standing on the door-step; *she at once asked me what made the horse go so lame.*"

Both rules are based on the same principle, namely, that the law will not (save in exceptional cases to be mentioned in subsequent chapters of this Part) receive as evidence of the relevant facts any narrative statement that is not made from personal knowledge and in open court, where evidence can be tested, and, if false, confuted; in other words, they aim at excluding the repetition in court of what may be called extra-judicial statements (*d*). The statement to the wife referred to in the first of the two examples just given was made from the personal knowledge of the witness; but it was not made in open court. That made by the wife referred to in the second example may be criticised equally from two points of view. The wife, whose statement it was, had spoken from personal knowledge, but her statement had been made out of court. Her husband, in repeating her statement, is testifying in open court, but he is vouching the knowledge of another. Therefore, whether the statement be regarded as his evidence or as in a sense hers, it fails to satisfy the rule.

The first rule, which excludes the previous statements of the witness, is of less importance than the second, as the witness is free to give direct evidence from his present recol-

(*d*) *R.* v. *Eriswell* (1790) 3 T. R. 707; *Berkeley Peerage Case* (1811) 4 Camp. 401, 414.

lection of the facts to be deposed to. And hence the cases are very few in which such statements have been considered of sufficient importance to be admitted as exceptional media of proof (*e*). Moreover, where the previous statement of a witness has taken the form of a written memorandum, the effect of the rule is considerably qualified by another rule, mentioned in Part IV, which permits a witness under certain conditions to refer to his memorandum for the purpose of refreshing his memory (*f*).

To the second rule, which excludes hearsay, a considerable number of important exceptions, to be mentioned in the remaining chapters of this Part, have of necessity been admitted. But in cases which do not fall within any of them the rule prevails even though its enforcement might have the effect of excluding the only information which is available on the matter in question. Hence hearsay will not, apart from such exceptions, be admitted even though it can be proved that the person who made the statement which the witness is prepared to repeat made it on oath (*g*), or that it was against his interest when he made it (*h*), or that he is prevented by insanity or other illness (*i*) from giving evidence himself, or that he has left the country and disappeared (*k*), or has died (*l*). And the rule excludes not only statements, whether oral or written, but also a person's conduct whenever it is relied upon for the same purpose as an express statement, that is, as tending to show his

(*e*) See Part III, Chapters VI and VII, and Part IV, Chapter III, in part, pp. 345—350.

(*f*) See Chapter I, § 6, pp. 328—334.

(*g*) *R.* v. *Eriswell* (1790) 3 T. R. 707.

(*h*) *Barough* v. *White* (1825) 4 B. & C. 325, 327, 328; *Phillips* v. *Cole* (1839) 10 A. & E. 106. And *à fortiori* it is not evidence if the person making it was interested in making it: *R.* v. *Debenham* (1818) 2 B. & Ald. 185.

(*i*) *R.* v. *Eriswell* (1790) 3 T. R. 707; *Harrison* v. *Blades* (1813) 3 Camp. 457.

(*k*) *Stephen* v. *Gwenap* (1831) 1 Moo. & R. 120.

(*l*) *Wright* v. *Doe* (1837) 7 A. & E. 313; *Berkeley Peerage Case*, 4 Camp. 403, 414.

knowledge or opinion in regard to the existence of some fact which it is sought to prove. Thus, where the issue was whether a testator was of sound mind at the time when he made his will, a question upon which those who knew him would be entitled to give evidence as to his habits and conduct and mental condition, it was held that the defendant was not entitled to put in evidence certain letters from friends and acquaintances of the deceased which were not proved to have been read and understood by him. The purpose of tendering them in evidence was to show from the nature of their contents that the writers considered the testator as a person of intelligence capable of understanding them; but it was held that this was equivalent to giving evidence of the statements or opinions of the writers without calling them as witnesses (*m*). Again, where the assignees of bankrupt partners sued for goods sold and delivered by the bankrupts to the defendants, and the main question was whether there had been any acts of bankruptcy committed prior to January, 1837, the plaintiffs, in order to establish the affirmative, proposed to give evidence to prove that prior to that date the bankrupts had tendered other goods to others of their creditors, who however upon the issue of the fiat of bankruptcy had returned them to the plaintiff's attorney. It was held by the court that as the only materiality of this evidence was to show by the conduct of those creditors that they were of opinion that the debtors were not entitled to transfer the goods to them, the evidence was not admissible any more than statements made by them to the same effect would have been (*n*).

Statements and conduct of this description are often termed *res inter alios actæ*. This term is intended to emphasize the fact that they have taken place behind the back

(*m*) *Wright* v. *Doe* (1837) 7 A. & E. 313; 4 Bing. N. C. 489; cp. pp. 96–98, above.

(*n*) *Backhouse* v. *Jones* (1839) 6 Bing. N. C. 65.

and without the acquiescence of the party against whom they are tendered in evidence, and aptly distinguishes them from similar statements (or conduct equivalent to statements) made in the presence of an opposite party, which statements or conduct, when taken together with the opponent's answer or conduct in reply thereto, may frequently be given in evidence as admissions by conduct made by the latter, as hereinafter mentioned (*o*).

On the same principle it is held that in any action for damages caused to the plaintiff by some act for which the defendant has been convicted and sentenced in a criminal court, the plaintiff is not entitled, in order to prove the commission by the defendant of the wrongful act, to give the conviction or judgment in evidence against him, if it passed against him in spite of a plea of not guilty. Such a verdict or sentence expresses the opinion of persons who are not now before the court, *i.e.*, the judge and jurors by whom the defendant was formerly tried and convicted, and the ground of whose opinion cannot now be tested (*p*). And conversely the plaintiff could not give in evidence a verdict or judgment in his own favour, to which the defendant was not a party.

The rule against hearsay applies in strictness to the proof of the relevant facts in the course of cross-examination just as much as to their proof by examination-in-chief. That is to say, a party is not entitled to prove his case merely by eliciting from his opponent's witness in cross-examination not his own knowledge on the subject, but what he has heard others say about it, but has not verified for himself. The application of the rule is however obscured by the fact that a party is entitled to test the credibility of his opponent's

(*o*) See Chapter on Admissions, at pp. 153—157.

(*p*) *Smith* v. *Rummens* (1807) 1 Camp. 9; and *Hathaway* v. *Barrow*, *ibid.* 151, explained by Parke B. in *Blakemore* v. *Glamorganshire Canal Co.* (1835) 2 C. M. & R. 133, at p. 139. As to issues concerning public or general rights, see pp. 232—234.

witness, and for that purpose to question him, *inter alia*, as to statements made to him by other persons, and his own conduct thereon, so that the party by whom the witness was called is not entitled to exclude the question, but only to comment to the jury on the effect and value of the witness's answer (*q*). Similar considerations apply with even greater force to the witness's admissions in cross-examination of his own previous statements about the relevant facts. Although not strictly admissible as evidence on the issue (unless he is a party, in which case they would be admissions) they are excellent means of testing the credibility of his evidence.

Opinion of Experts.—There are many matters which are not the subject of direct perception by the senses, and which can only be ascertained by inferences to be drawn by persons trained in some science, art or business with which the subject is connected. The authorship of an old work of art, or the extent and character of the pollution of a stream, are examples. On all such subjects as these the evidence of experts is admissible (*r*). And inasmuch as their evidence is based partly on observation and partly on calculations and inferences derived from others by means of study and special training, it does not comply precisely with all the requisites of direct oral evidence, and is commonly spoken of as the Opinion of Experts.

Thus the opinion of engineers is admissible on the question whether a bank erected for the purpose of preventing the overflow of the sea has caused the choking up of a harbour (*s*), the opinion of ship-builders and surveyors as to the seaworthiness of a vessel (*t*), and that of medical men in regard to symptoms of bodily or mental disease (*u*). So, in prosecutions for

(*q*) See in connection with this the observations at pp. 321—326.

(*r*) *Carter* v. *Boehm* (1765) 1 Sm. L. C.; *Beckwith* v. *Sidebotham*, 1 Camp. 116.

(*s*) *Folkes* v. *Chadd*, 3 Dougl. 157.

(*t*) *Thornton* v. *Royal Exchange Assurance Co.* (1791) Pea. 25; *Beckwith* v. *Sidebotham* (1807) 1 Camp. 116.

(*u*) *Ibid.* p. 117; *R.* v. *Wright* (1821) R. & R. 456.

forging or uttering forged bank notes, or uttering counterfeit money, the opinion of a clerk of the bank, or of an officer connected with the mint, is resorted to. And upon questions as to the infringement of copyright in a piece of music the opinion of musicians is constantly given in evidence as to whether the piece alleged to have been pirated is original, or as to how far the alleged piracy is an imitation (*x*). And generally as to any question of art, science, or special commercial usage, or of foreign law (*y*), such evidence is admissible. The genuineness of handwriting may now be tested by means of comparison made by any witness or by the jurors themselves (*z*), but it is also not infrequently treated as a subject for expert evidence. On the other hand, where the question is one with which the jury may be presumed to be as well acquainted as any witness, such as questions of morality or professional honour, no such evidence is admissible (*a*). It is not however easy to define precisely the limits of the admissibility of expert evidence. The difficulty is illustrated by the various decisions on the admissibility of evidence of insurance brokers to prove the materiality of particular statements for the purpose of effecting a policy (*b*).

It follows from what has been said that before such evidence can be given the witness must be shown to have sufficient training and skill to entitle him to speak with some reasonable authority upon the particular subject. Thus it has been held that a witness whose knowledge of medicine or of foreign law is derived solely from study, unsupplemented by practice, is incompetent to give evidence on those subjects respectively (*c*).

(*x*) Phill. Ev. 10th ed. I 522.

(*y*) *Carter* v. *Boehm*, 1 Sm. L. C.; *Re Bonelli* (1875) 1 P. D. 69.

(*z*) 28 Vict. c. 18 s. 8; see pp. 370—371, below.

(*a*) *Ramadge* v. *Ryan* (1832) 9 Bing. 333.

(*b*) See the cases collected in the notes to *Carter* v. *Boehm*, 1 Sm. L. C.

(*c*) *Bristowe* v. *Sequeville* (1850) 5 Ex. 275; *Re Bonelli* (1875) 1 P. D. 69. Cf. *Re Whitelegg* [1899] P. 267, and *Re Turner* [1906] W. N. 27.

CHAPTER II.

ADMISSIONS AND CONFESSIONS.

§ 1. *Definition.*
§ 2. *Form of Admissions.*
§ 3. *Admissions of Hearsay, and of the Contents of Documents.*
§ 4. *The whole Admission must be taken together.*
§ 5. *Persons whose Admissions are Evidence against Another.*
(i) *Ordinary Business Agents.*
(ii) *Agents of Corporations.*
(iii) *Joint Contractors.*
(iv) *Conspirators and Joint Offenders.*
(v) *Co-executors.*
(vi) *Co-defendants or Respondents.*
(vii) *Counsel and Solicitors.*
(viii) *Parties who are Trustees or Agents.*
(ix) *Persons for whom the Parties are Trustees or Agents.*
(x) *Predecessors in Title.*
§ 6. *Interrogatories and Notices to Admit Facts.*

§ 1.—Definition.

Among all the exceptions to the rule against hearsay Admissions and Confessions claim the first place by reason of their frequency and importance. The term Admission, as here used, means any statement made out of the witness-box by a party to the proceedings, whether civil or criminal, or by some person whose statements are binding on the party as hereinafter mentioned, against his own interest (*a*). It includes therefore admissions made by the opposite party in answer to interrogatories under Order XXXI, or in answer

(*a*) It also embraces conduct which is equivalent to a statement as hereinafter explained: see pp. 152—158.

to a notice to admit facts under Order XXXII; but it does not include admissions of relevant facts made by a party in the witness-box, since these are part of his direct oral evidence; nor admissions made on the pleadings, since their function is to limit the issues and therewith the scope of the evidence admissible; nor any admissions made out of court in so far as they are not merely a medium of proof, but create specific rights and liabilities, as acknowledgments under the Statute of Limitations, estoppels *in pais*, waiver of forfeiture, and the like. The term Confession denotes an admission made before trial by the defendant to criminal proceedings.

The guarantee of credibility of this medium of proof is the fact that the statement is made voluntarily against the interest of the person making it; and a statement is deemed to be against his interest if it tends in any way towards the disproof of any part of his own case, or the corroboration of any part of his opponent's, in the proceedings in which it is tendered.

In the words of Chief Baron Gilbert:

> As persons interested are utterly removed from being evidence for want of integrity, so on the other side the voluntary confession of the party in interest is reckoned the best evidence; for if a man's swearing for his interest can give no credit, he must certainly give most credit when he swears against it; but then this confession must be voluntary and without compulsion; for our law in this differs from the civil law, that it will not force any man to accuse himself; . . . . pain and force may compel men to confess what is not the truth of facts, and consequently such extorted confessions are not to be depended on (*b*).

That no man could be compelled to criminate himself was one of the most sacred principles of the common law—*nemo*

(*b*) Gilbert, Ev. 6th ed. 1801, p. 123; cf. *R.* v. *Warickshall* (1783) 1 Leach, 263; *Doe* v. *Wainwright* (1838) 8 A. & E. 691, 700; *Slatterie* v. *Pooley* (1840) 6 M. & W. 664, 669.

tenetur se ipsum accusare (*c*)—and in its application to the making of admissions or confessions it is well illustrated and confirmed by the enactment of sect. 18 of the Indictable Offences Act, 1848 (*d*), prescribing the mode in which alone the statement of a prisoner before a committing magistrate is to be received and recorded. Inasmuch however as the principle is not confined to parties alone, but applies also to witnesses, its further discussion and illustration will be found in the chapter relating to Privilege (*e*), where certain statutory exceptions are also mentioned.

§ 2.—Form of Admissions.

No particular form is necessary for admissions; they may be either in writing or by word of mouth, express or merely implied from conduct.

Express admissions hardly require illustration, but the following may be given as examples of such admissions made incidentally by means of a description. In an action brought by the assignee of a bankrupt, Durouveray, to recover the proceeds of goods which had been sold by the defendant, an auctioneer, on the bankrupt's account, it was held sufficient *primâ facie* evidence of the bankruptcy for the plaintiff to prove that the defendant had in his catalogue of sale incidentally described the goods as being "the property of Durouveray, a bankrupt" (*f*). And where an action was brought for the breach by shipowners of a contract to carry safely the plaintiff's goods, it was held sufficient *primâ facie* evidence that the defendants were the owners of the vessel, that before action their attorney had incidentally

(*c*) *Ex parte Cossens, Re Warroll* (1820) 1 Buck. 531, 540; *R.* v. *Scott* (1856) 1 D. & B. 47, 57.

(*d*) 11 & 12 Vict. c. 42.

(*e*) See below, pp. 269—307; and especially pp. 272—275, 306, 307.

(*f*) *Maltby* v. *Christie* (1795) 1 Esp. 340.

described them as "the owners" in an undertaking to appear on their behalf (*g*).

Admissions may be implied from conduct in such an endless variety of circumstances, that it is only possible to give here a few typical examples.

One class of such admissions consists of those cases where a party, by making use of some written document as evidence in his own behalf, is held to have made it available against himself. He is deemed to have thereby impliedly admitted the truth of its contents (*h*), although he is not in like manner bound by all that his witnesses may allege, as he frequently cannot be sure beforehand of all they will say (*i*). Another class consists of those cases where a party performs acts which can only be warranted by his possession of some particular office, and thereby justifies the inference that he is entitled to such office. Thus in an action against a clergyman for non-residence it was held sufficient *primâ facie* evidence of the defendant's official character to prove that he had received the tithes, performed the church services, and in other respects acted as the incumbent (*k*). So, in an information against a military officer for making false returns, it was held unnecessary for the plaintiff to produce the defendant's commission, it being sufficient for him to prove that the defendant had as a fact acted as such officer (*l*). And in a prosecution against a letter-carrier for embezzling an overcharge upon a letter, it was held unnecessary for the prosecution to prove the prisoner's appointment, in order to prove that he was employed in the public service,

(*g*) *Marshall* v. *Cliff* (1815) 4 Camp. 133.

(*h*) *Brickell* v. *Hulse* (1837) 7 A. & E. 454, 457; *Richards* v. *Morgan* (1863) 33 L. J. Q. B. 114.

(*i*) *Gardner* v. *Moult* (1839) 10 A. & E. 468; *R.* v. *Latchford* (1844) 6 Q. B. 567, 577; and see p. 162 below.

(*k*) *Bevan* v. *Williams* (1776) 3 T. R. 635, note (*a*).

(*l*) *R.* v. *Gardner* (1810) 2 Camp. 513.

one of the witnesses having given evidence that the defendant had in fact acted as a letter-carrier (*m*).

The converse of these cases are those where one party, by his conduct and dealings with the other, clearly, though impliedly, attributes to the latter the possession of some particular office or character. Thus, where the plaintiff sued as an assignee in bankruptcy for the price of goods purchased by the defendant of the bankrupt, it was held sufficient *primâ facie* evidence of the plaintiff's appointment as assignee that the defendant had attended meetings of the commissioners in bankruptcy, and, after discussing the cross-accounts between himself and the bankrupt, had made a payment to the plaintiff as assignee (*n*). Analogous to the foregoing are the cases where a party, having debited some third person in account for goods sold or otherwise, has been deemed thereby to have admitted that credit was given by him to such person and not to the party he now seeks to charge (*o*).

Another important class of cases consists of those where the party does not himself say or do anything, but tacitly acquiesces in the statement of some other person under circumstances which make it reasonable to regard his silence as equivalent to assent. Such an acquiescence is worth very little where the party who hears the statement made has no means of his own of knowing whether it be true or false; but if he has those means it may be of great weight (*p*). Thus in an action of ejectment by a landlord against his tenant it was held that the service upon the tenant of a notice to quit, from which it appeared that the tenancy was assumed to be a Michaelmas tenancy, was *primâ facie* evidence of the terms of the holding in that respect, being received

(*m*) *R.* v. *Borrett* (1833) 6 C. & P. 124.
(*n*) *Dickinson* v. *Coward* (1818) 1 B. & A. 677.
(*o*) *Storr* v. *Scott* (1833) 6 C. & P. 241.
(*p*) *Hayslep* v. *Gymer* (1834) 1 A. & E. 162, 165.

without objection by the tenant at the time of service (*q*). So in an action for breach of promise of marriage, where it was proved that the plaintiff had said to the defendant "You always promised to marry me, and you don't keep your word" and the defendant made no answer, it was held that this was "material evidence in support of the promise" within the meaning of 32 & 33 Vict. c. 68 s. 2, which enacts that no plaintiff in an action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be so corroborated (*r*). If on the other hand the statement was made under circumstances in which it would not be reasonable to expect a reply, the silence of the person addressed cannot fairly be treated as an admission. Thus, if one of the parties has been present on some occasion at legal proceedings to which he was a stranger, and evidence was therein given adverse to himself, the fact that he did not interpose to contradict the witness or otherwise attempt to displace the effect of the testimony cannot be deemed an admission by him of its truth, since there is a certain formality observed in such proceedings which would prevent his interposing as he might do in the case of ordinary conversation. Nor even if he was entitled, as being himself a party to such proceedings, to cross-examine the witness, and did not do so, is he therefore necessarily to be deemed to have admitted the truth of the whole of such witness's evidence (*s*). It must depend on all the circumstances of the case whether his silence can fairly be construed into an admission or not. So it has several times been held that the non-contradiction by one prisoner of a statement made by his fellow prisoner before the magistrate is not to be deemed an admission (*t*).

(*q*) *Doe* v. *Forster* (1811) 13 East, 405; *Thomas* v. *Thomas* (1811) 2 Camp. 647.

(*r*) *Bessela* v. *Stern* (1877) 2 C. P. D. 265, 271, 272; and compare the case of *Wiedemann* v. *Walpole*, cited at length at pp. 155—157.

(*s*) *Melen* v. *Andrew* (1829) M. & M. 336.

(*t*) *R.* v. *Appleby* (1821) 3 St. 33; *R.* v. *Turner* (1832) Moo. C. C. 347.

At one time it seems to have been thought that a duty was cast upon the recipient of a letter to answer it, and that his omission to do so amounted to evidence of an admission of the truth of the statements contained in it; but no such general rule is now recognized. It may sometimes happen that the relation between the parties is such that a reply might be properly expected, so that an inference might fairly be drawn from the neglect to send one (*u*). But to abstain from taking the trouble to write a reply is obviously a very different thing from silence in the face of a damaging statement made in the course of conversation, and which would involve no trouble to answer. One man has no right to put upon another the burden of the choice of writing a disavowal, or being bound by all the statements in a letter he has received (*x*). If the rule were otherwise, it might easily lead to mischievous attempts to manufacture evidence by making tricky statements of the party's case, and then offering it in evidence as a statement admitted by the opposite party (*y*). In an action for breach of promise of marriage, the promise being denied by the defendant, the fact that the defendant had not answered a letter written to him by the plaintiff, calling upon him to fulfil his promise of marriage, was held not to be any admission on his part in corroboration of the plaintiff's evidence (*z*). Lord Esher M. R. said:—

> The first letter put forward by the plaintiff's counsel is one written by the plaintiff to the defendant, in which she states in effect to the defendant that he had promised to marry her. He did not answer it. When one comes to think what is meant by not answering it, it is impossible to see how that could be any evidence in corroboration of the promise to marry. The argument that it was such evidence must be that not answering was an admission by the defendant of the truth

(*u*) *Richards* v. *Gellatley* (1872) L. R. 7 C. P. 127, 131.
(*x*) *Felthouse* v. *Bindley* (1862) 31 L. J. C. P. 204, 206.
(*y*) *Gaskill* v. *Skene* (1850) 14 Q. B. 664, 670.
(*z*) *Wiedemann* v. *Walpole* (1891) 2 Q. B. 534,

of what was alleged against him in the letter. Now, the allegation in the present case was that he had promised to marry the plaintiff. Suppose, however, the letter had charged against him some grievous offence or misconduct, and the writer had stated that unless the defendant paid something he would be exposed. The argument, if true at all, must be that by not answering such a letter the man who receives it must be taken to admit that he is guilty of the charges contained in it. Now, there are cases—business and mercantile cases—in which the courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree. So, where merchants are in dispute one with the other in the course of carrying on some business negotiations, and one writes to the other, 'but you promised me that you would do this or that,' if the other does not answer the letter, but proceeds with the negotiations, he must be taken to admit the truth of the statement. But such cases as those are wholly unlike the case of a letter charging a man with some offence or meanness. Is it the ordinary habit of mankind, of which the courts will take notice, to answer such letters; and must it be taken, according to the ordinary practice of mankind, that if a man does not answer he admits the truth of the charge made against him? If it were so, life would be unbearable. A man might day by day write such letters, which, if they were not answered, would be brought forward as evidence of the truth of the charges made in them. The ordinary and wise practice is not to answer them—to take no notice of them. Unless it is made out to be the ordinary practice of mankind to answer, I cannot see that not answering is any evidence that the person who receives such letters admits the truth of the statements contained in them. I have, therefore, no doubt that the mere fact of not answering a letter stating that the person to whom it is written had made a promise of marriage, is no evidence whatever of an admission that he did make the promise, and therefore no evidence in corroboration of the promise. I do not say there may not be circumstances, occurring in a correspondence between a man and woman, which would or might make the omission to answer one letter in the correspondence some evidence of an admission of the truth of the statements contained in that letter. There might be cases in which the court thought that, having regard to the nature of the correspondence and the circumstances of it, the not answering one letter in that correspondence did amount to evidence of an admission; but this is not one of those cases. Here we have only to say whether the mere fact of not answering the letters, with nothing else for us to consider, is any evidence in corroboration of the promise. If the fact of the defendant not having answered the plaintiff's letter is no evidence in

corroboration, it is clear that the not answering the letter of a mere stranger, such as the pastor of the German church, or the letter of the burgomaster, which does not contain any reference to the alleged promise to marry, cannot be evidence in corroboration.

The most striking examples of admissions by conduct are those which do not relate to any one specific fact, but indicate that the whole claim or defence of the party making it is unfounded. Thus, where the plaintiff sued a railway company in respect of injuries alleged to have been caused to his wife by their negligence, the defendants tendered evidence to show that the plaintiff had suborned as witnesses several persons who had not been present at the accident, to support his case by means of false evidence with regard to it. The judge ruled that the evidence was admissible, and the court affirmed his decision, and held that the plaintiff's conduct was equivalent to an express admission by him that he had no right whatever to succeed in the action (*a*).

Admissions of this character, inferred from the circumstances of a man's conduct, are well illustrated in many criminal cases. Thus, on the trial of a man for the secret murder of another, the prosecution are entitled not merely to prove circumstances preceding the crime and indicating motive, intention, preparation and opportunity, but also to prove that after it had been committed the prisoner acted like a guilty man in that he concealed an instrument with which it might have been perpetrated, endeavoured to remove bloodstains from his clothes, gave a false account of the mode in which his time had been spent during the period within which the murder must have been committed, and in several respects was noticed to behave in an unusual manner. These two classes of facts, namely, the various acts leading up to the commission of a crime, or other transaction, on the one hand, and the subsequent conduct and statements tending to

(*a*) *Moriarty* v. *L. C. & D. Ry. Co.* (1870) L. R. 5 Q. B. 314, 321.

show a sense of guilt or liability, on the other hand, together form the great bulk of what is commonly known as circumstantial evidence. But although the first class are, strictly speaking, Relevant Facts, and the second class Admissions by Conduct, the distinction, being in this case of no great practical importance, does not ordinarily receive any special emphasis or notice (*b*).

§ 3.—Admissions of Hearsay, and of the Contents of Documents.

(i) *Hearsay.*—Where an admission is based on hearsay it is still admissible in evidence; but if the hearsay materials on which the admission is based are before the court, and it is clear that a mistaken inference has been drawn from them, the admission is entitled to no weight, and the party may rely on the truth of the facts as they have since appeared (*c*). Even where the facts are not before the court, and the party must be his own judge of the value of the hearsay which he adopts, little weight will attach to his admission unless it appears that it has been advisedly made in such circumstances as to justify the jury in placing reliance on it (*d*).

(ii) *Contents of Documents.*—There was at one time considerable doubt as to whether an oral admission might relate to the contents of a written document not proved to be incapable of production (though it does not appear to have been questioned in the case of written admissions (*e*)); it is now however settled that it may (*f*).

(*b*) See on this subject Chapter I of Part II, p. 63, note (*p*).

(*c*) *Bulley* v. *Bulley* (1874) 9 Ch. 739.

(*d*) *Roe* v. *Ferrars* (1801) 2 B. & P. 542, 548.

(*e*) For the general rule as to adduction of documents see below, p. 354 *seq.* For the older cases see Phill. Ev. 10th ed. vol. I 320—325.

(*f*) *Slatterie* v. *Pooley* (1840) 6 M. & W. 664; *Murray* v. *Gregory* (1850) 5 Ex. 468. The rule is severely criticised in *Lawless* v. *Queale* (1845) 8 Ir. L. R. 382. For the rules relating to cross-examination as to contents of documents, see pp. 322, 325.

§ 4.—The whole Admission must be taken together.

The party whose statement is put in as an admission has always the right to have the whole statement given in evidence. It would obviously be unfair to allow a party to select from his opponent's statement that portion alone which tells against him, and to suppress that which is in his favour. The chief difficulty in the application of the rule lies in determining when statements are so connected together as to form a whole within the meaning of the rule. The matter does not depend on the statements being contained in one single document, but on the nature and degree of the connection between them; and it may be said that the rule embraces these two propositions: (i) when a party's admission is so qualified or explained by some other statement made by him at the same time that the latter is in fairness necessary to present the true intention and meaning of the former, then the party is entitled, if his admission is given in evidence against him, to have the qualifying statement put in evidence as a portion of the admission; (ii) when the admission of a party refers expressly or by implication to some antecedent statement either of himself or his opponent or any third person, then the statement so incorporated or referred to forms a part of the whole admission within the meaning of the rule.

The following are examples of the application of the principle in civil cases. Where the plaintiffs had requested the defendant to make out an account of the amount which he owed them for goods sold, but the defendant's agent before delivering it jotted down upon it with his master's authority a note of a counter-claim which the defendant had against the plaintiffs, and the plaintiffs sought to give the account alone in evidence as an admission of the amount of his claim, it was held by Mansfield C. J. that the whole document must be taken together, since the defendant's statement was made

"all in one breath," and he had never admitted the account as distinct and independent from the counter-claim (*g*). Where, on the other hand, the plaintiff had given in evidence certain entries contained in the account books of the defendant, and the defendant thereupon insisted upon his right to have other distinct entries read from other parts of the same book, though unconnected with the former, it was held that, while the defendant was entitled to have the whole of the particular entry read, he could not insist upon reading distinct entries from different parts of the book (*h*). Again, where the plaintiff put in the defendant's answer filed in a previous chancery suit, it was held that the defendant was entitled to have also put in, as part of the plaintiff's case, the bill to which it referred (*i*). But if on the other hand it is the incorporated document which is used as an admission, there is no right to insist on that which incorporates it being put in (*k*). The rule is well illustrated by cases relating to conversations and correspondence, and also by some of those relating to the re-examination of witnesses in court, decided on the same principle. Thus it is never allowed that the answers of a party given in the course of conversation should be proved against him, without also giving in evidence the questions which drew forth these answers (*l*). But when a party gives in evidence a statement made by his opponent in the course of conversation on some previous occasion, that does not authorize the latter to prove everything that he said on that same occasion, but only so much of it as can be connected in one of the ways above mentioned with the statement that has been put in (*m*). So, where the plaintiff had given in evidence three letters written by the defendant to

(*g*) *Randle* v. *Blackburn* (1813) 5 Taunt. 245.
(*h*) *Catt* v. *Howard* (1820) 3 St. 3.
(*i*) *Pennell* v. *Meyer* (1838) 2 Moo. & Rob. 98.
(*k*) *Long* v. *Champion* (1831) 2 B. & Ad. 284.
(*l*) *Pennell* v. *Meyer* (1838) 2 Moo. & Rob. 98, 99.
(*m*) *Prince* v. *Samo* (1838) 7 A. & E. 627, 634.

his partner abroad, the terms of which were proved, on the non-production of the originals, by means of the defendant's copy letter book, and the defendant contended that he was entitled to give in evidence in his own behalf several others of his own letters contained in the same book, it was held that he was not entitled to give any in evidence except two which were expressly referred to in the three which the plaintiff had put in (*n*).

The principle has been constantly applied in criminal proceedings. Thus, if any part of the prisoner's statement is put in evidence, the prisoner is entitled to have the whole of it proved, notwithstanding that it may implicate other persons, and although they should be on their trial at the same time (*o*). It is held that the prosecutor is not bound by the prisoner's statement, even if he should put it in, and hence it has become the regular practice for the prosecution to put in the prisoner's statement no less when it is entirely in his favour than when it is adverse to him (*p*).

§ 5.—Persons whose Admissions are Evidence.

Evidence may be given against a party not only of his own admissions, but also of those of his agents acting within the scope of their authority. Whether an admission that has been made by a party's agent is receivable against his principal seldom depends upon express authority, but is determined generally by reference to the scope of the agency, and the occasion on which the admission was made. If however a party refers to some third person as being able to give an accurate account of some particular matter, he

(*n*) *Sturge* v. *Buchanan* (1839) 10 A. & E. 598, 604.

(*o*) *R.* v. *Jones* (1827) 2 C. & P. 629; *R.* v. *Hearne* (1830) 4 C. & P. 215; *R.* v. *Fletcher*, *ibid.* 205; *R.* v. *Walkley* (1833) 6 C. & P. 175; cp. cases in 1 Lew. C. C. 110. But a statement by one prisoner is not evidence against his fellow prisoner: see pp. 167, 168 below; and cf. p. 134 above.

(*p*) *R.* v. *Jones* (1827) 2 C. & P. 629.

may thereby make him an agent for the purpose of such statement. As Lord Ellenborough said, "If a man refers another upon any particular business to a third person, he is bound by what this third person says or does concerning it as much as if that had been said or done by himself" (*q*). It is somewhat like the case where a man refers to a document as containing the true account of a particular matter, thereby making it evidence in regard to the particulars for which he has so vouched its correctness (*r*). But the witnesses whom a party calls at the trial are not his agents within the meaning of this rule (*s*).

In civil and criminal cases alike it is of course necessary to give some evidence of the agency. But inasmuch as in criminal cases the agency, which generally involves conspiracy, is often only to be inferred from the correspondence exhibited in the acts of the parties, indicating a joint purpose, it has been repeatedly held that it is no objection to the admissibility of facts tendered in evidence to prove a criminal conspiracy that they consist in part of the very acts which are charged as criminal; in other words, although it is the proper course, where practicable, for the prosecutor of a charge of conspiracy to give first general evidence of the conspiracy as a preliminary step to proving the particular acts done in alleged execution of it, yet in many cases this is impossible and the conspiracy must be inferred merely from the co-operation of the persons charged in the execution of the illegal transaction (*t*).

(i) *Ordinary Business Agents.*—An agent is generally a person employed to perform certain classes of acts on behalf

(*q*) *Williams* v. *Innes* (1808) 1 Camp. 364, and cases there referred to; cp. *Daniel* v. *Pit* (1809) 2 Pea. 238; *Gardner* v. *Moult* (1839) 10 A. & E. 464.

(*r*) *Brickell* v. *Hulse* (1837) 7 A. & E. 454; *Richards* v. *Morgan* (1863) 33 L. J. Q. B. 114; see p. 152 above.

(*s*) *Gardner* v. *Moult* (1839) 10 A. & E. 468; *R.* v. *Latchford* (1844) 6 Q. B. 567, 577; and see p. 152 above.

(*t*) *The Queen's Case* (1820) 2 B. & B. at p. 310; *R.* v. *Blake* (1844) 6 Q. B. 126; and see pp. 167, 168 below.

of his principal. It is not therefore ordinarily within the scope of his authority to make any statements which are not necessary for the performance of transactions of the authorised class.

Where the acts of the agent will bind the principal, there his representations, declarations and admissions respecting the subject-matter will also bind him, if made at the same time and constituting a part of the res gestæ (*u*).

The rule was thus summed up by Sir William Grant:

What the agent has said may be what constitutes the agreement of the principal; or the representations or statements made may be the foundation of, or the inducement to, the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove that the agent did make the statement or representation. So, with regard to acts done, the words with which those acts are accompanied frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words. But except in one or other of these ways, I do not know how what is said by an agent can be evidence against his principal. The mere assertion of the fact cannot amount to proof of it, though it may have some relation to the business in which the person making that assertion was employed as agent (*x*).

In short, it will not generally be presumed that an ordinary agent can bind his principal by a mere narrative without express authority to that effect; apart from such authority, no statements by the agent are admissible except such as form part and parcel of his business dealings on behalf of his principal. Thus, where the owners of ship and cargo brought an action against insurers for a total loss of cargo by capture, and the defendants sought to prove that there had been undue delay on the part of the plaintiffs' captain in departing from a certain foreign port, by tendering in evidence letters written to the plaintiffs by their own agents abroad narrating the course

(*u*) Story on Agency, § 134; and see Part II, Chapter IV above; especially p. 92 *seq.*

(*x*) *Fairlie* v. *Hastings* (1804) 10 Ves. 127, 128.

and incidents of the voyage, it was held that such letters were not admissible for the purpose, the agents having no authority to make the admissions sought to be relied on. Gibbs J. said:—

> When it is proved that A is agent of B, whatever A does or says or writes in the making of a contract as agent of B is admissible in evidence, because it is part of the contract which he makes for B, and therefore binds B; but it is not admissible as his account of what passes. Now, what are these letters? They are not part of the contract itself or of the res gestæ, but they are the account which the agent renders to his principal of what he is doing; they are not, therefore, admissible (*y*).

In another case where the plaintiff sued the defendant, a coal merchant, for penalties for selling coals short of measure, the plaintiff in support of his case called a witness to prove a conversation which he had had with one Pelly who managed the defendant's business. Lord Ellenborough admitted the evidence, saying:—

> Pelly appeared to be the manager and conductor of the defendant's business; what he might have said respecting a former sale made by the defendant, or on another occasion, would not be evidence to affect his master; but what he said respecting a sale of coals, then about to take place, and respecting the disposition of the coals then lying at the wharf, which were the object of sale, was in the course of witness's employment for the defendant, and was evidence to affect his master (*z*).

(ii) *Agents of Corporations.*—The same rule applies to corporations and other associations, which usually act through officers and agents. The admissions of the latter will only be evidence against their principals if the officer or agent make them (a) in the course of executing and as forming part of an

(*y*) *Langhorn* v. *Allnutt* (1812) 4 Taunt. 511, 519; cf. *Kahl* v. *Jansen*, *ibid.* 565.

(*z*) *Peto* v. *Hague* (1804) 5 Esp. 134; cf. *Helyear* v. *Hawke* (1803) 5 Esp. 72, relating to statements of groom authorised to sell a horse; and *Garth* v. *Howard* (1832) 8 Bing. 451, as to the statements of a shopkeeper's assistant.

authorised transaction; or (b) in pursuance of an authority to make statements or reports as to matters affecting his principals' business or interests; or (c) in the due execution of a general authority to carry on the business of his principals or a particular department of it with full discretion and powers of management.

The following cases illustrate the rule:—

In the winding-up of a joint-stock banking company in 1852 the official manager sought to make the executors of A contributories in respect of 500 "credit shares" in the company which their testator had agreed some eight years before to take (in addition to 20 shares he already held) and for the future allotment of which he had given his promissory note payable in five years. Three months after the note was given the testator died, and his executors applied to the directors of the company to ascertain the extent of his liability. The secretary on the instructions of the directors informed the executors that their testator's holding consisted of the 20 shares alone (which the executors thereupon assigned away), and they subsequently cancelled the 500 shares and the promissory note. It was held that the transaction of the 500 shares had never been completely carried out, that it was within the ostensible authority of the directors to make the admission and to cancel the transaction and that the executors were not liable as contributories (*a*).

In another case a shareholder sued a company for removal of his name from the share list on the ground of false statements made in the prospectus. The only evidence offered by the plaintiff of the falsity of the statements consisted of a speech made by the chairman of the company at their statutory meeting. This was rejected by Fry J. who said:—

> The only ground upon which, in my view, this statement could possibly be admitted would be that the chairman was the agent of the

(*a*) *Meux's Executors' Case* (1852) 2 De G. M. & G. 522.

company, and that he was making the statement in the course of a transaction with a third party in which he was acting as the agent of the company, and that it was within the scope of his agency. If that were so, the statement would be admissible against the company. It appears to me, however, that it is not admissible, for it was made by the agent, not in a transaction between the company and a third party, but at a meeting of the company. It is the case of an agent making a report to his own principal, and, in my view, when an agent is making a confidential report to his principal, the report is not admissible evidence in favour of a third party (*b*).

In another case the facts were as follows:—The plaintiffs brought an action against a railway company for the value of a parcel containing money to the value of £35, delivered to the defendants and alleged to have been lost by the felonious act of one of their servants. The parcel had been consigned by the defendants' railway to one of their stations addressed to the plaintiffs who carried on business near. The plaintiffs never received the parcel, and on the day of its dispatch a porter who was employed by the defendants at the same station disappeared. The plaintiffs called a superintendent of the police to prove a statement which had been made to him by the station-master of the station, tending to prove the commission by the missing porter of the felony alleged. The evidence given by the superintendent, after objection by the defendants, was as follows:—

I am superintendent of police at Ulverston; I know Podmore, the station-master at Ulverston; in consequence of a communication in writing, I went to him on Saturday the 20th of July. He told me that a man of the name of John Haslam had absconded from the service; that a money parcel was missing, and he (Podmore) suspected Haslam had taken it. He said Haslam was the parcel porter. Would I (witness) make inquiries about him?

A verdict having passed for the plaintiffs, on application made by the defendants for a new trial it was held that the evidence was rightly admitted, since the station-master, having the sole management of the station, must be taken

(*b*) *Re Devala Gold Mining Co.* (1883) 22 Ch. D. 593.

to have had authority to communicate with the police, and to take steps for having Haslam apprehended, and that the statements made by him for the purpose of setting the police in motion, were evidence against the defendants (*c*).

(iii) *Joint Contractors.*—Since partners and joint contractors are mutual agents for certain purposes, the common law applied the same rule to them, regard being had to the scope of the particular authority in each case. And with regard to the former sect. 15 of the Partnership Act, 1890 (*d*), now enacts that—

> An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm.

But in all such cases the interest must be a joint and not merely a common interest, and the admission must be made with respect to the joint interest and during its continuance, and not before it has commenced, or after it has ceased (*e*), unless there are special facts which make the agency continue after the partnership or joint interest has ceased (*f*).

(iv) *Conspirators and Joint Offenders.*—Persons who are guilty of illegally conspiring together or of committing jointly any criminal offence are deemed to be mutual agents or confederates for the purpose only of the execution of the joint purpose. Accordingly any act done by one of them in the execution of the common purpose is deemed the act of the others also, and is consequently admissible in evidence against them; but since the confederacy does not extend to the subsequent narration of any such acts, no statement in the nature of mere narrative by one of them is evidence against any other. It is on this principle that the

(*c*) *Kirkstall Brewery Co.* v. *Furness Rail. Co.* (1874) L. R. 9 Q. B. 468.
(*d*) 53 & 54 Vict. c. 39.
(*e*) *Kilgour* v. *Finlyson* (1789) 1 H. B. 155; cited in *Watson* v. *Woodman* (1875) 20 Eq. 721.
(*f*) *Tucker* v. *Tucker* [1894] 3 Ch. 429.

confession of one party to the commission of a crime is not evidence against any of the other parties concerned in it (*g*). The following is a leading case on this rule. Two persons named Blake and Tye were informed against for defrauding the revenue of customs duties upon certain imported goods. Tye was a custom house agent and Blake a landing waiter. Blake alone appeared. It was proved that Tye had purported to make on behalf of the importer a "perfect entry" of the goods, showing their quantities and the duty payable on them; that Blake, after copying the entry into the "customs blue book," and having pretended to check the goods by means of the latter, had marked the entry as "correct," and that the duties had thereupon been paid in accordance therewith. The prosecution, in order to show that the quantity of goods actually imported was much larger than that so shown, that the defendants had received the duties from the importer on the true quantity, and that they had divided the difference between themselves, tendered in evidence—(a) a day-book kept by Tye, containing the entries of the true quantities of the goods and of the true amount of the duties thereon, upon which entries the importer had actually made his payment to Tye; (b) a counterfoil of a cheque, contained in a cheque-book of Tye's, containing an account or memorandum showing that the corresponding cheque had been drawn for a sum equal to half the total amount of certain sums of money, which included *inter alia* the profits made upon this transaction from the alleged fraud, the proceeds of which cheque had been traced to Blake. It was held that the entries in the day-book, being necessary for the purpose of carrying out the fraud, and so forming part of the transaction, were admissible against Blake; but that the counterfoil, being simply a record of a past transaction kept for Tye's own convenience, was inadmissible (*h*).

(*g*) *R.* v. *Turner* (1832) Moo. C. C. 347; and see above, p. 162.
(*h*) *R.* v. *Blake* (1844) 6 Q. B. 126.

(v) *Co-executors.*—The rule as to joint contractors has no application to executors, since their relations to each other depend not on contract but the common law. It is however now held that where an admission or acknowledgment of an executor is such as will render him liable in his representative capacity it will bind the assets and so render his co-executor liable in his representative capacity (*i*).

(vi) *Co-defendants and Respondents.*—The admissions of one of two defendants in a civil case is not evidence against his co-defendant, nor is the admission of a respondent evidence against the co-respondent in proceedings for divorce (*k*).

(vii) *Counsel and Solicitors.*—Counsel has complete authority over any civil proceeding which he is retained to conduct, as, for instance, the authority to withdraw the record or withdraw a juror, or to select such witnesses as in his discretion he thinks ought to be called, and to take any other step properly incidental to the management and conduct of the action (*l*), such as consenting to a verdict on special terms (*m*) or agreeing for valuable consideration not to appeal from an adverse decision (*n*). He therefore has authority to make any admissions on behalf of his client which in the honest exercise of his judgment he considers proper. Thus, where a verdict had been taken for the plaintiff in an action subject to the opinion of the court on a special case, and a special case was drafted and signed by the junior counsel of each side, but owing to the omission therefrom of certain material facts the case had to be sent down for trial, it was held that the special case might be put in at the second trial as evidence of all the facts stated in it (*o*).

(*i*) *Re Macdonald* [1897] 2 Ch. 181.
(*k*) *Robinson* v. *Robinson* (1858) 1 S. & T. 363.
(*l*) *Swinfen* v. *Chelmsford* (1860) 29 L. J. Ex. 382, 397.
(*m*) *Matthews* v. *Munster* (1887) 20 Q. B. D. 141.
(*n*) *Re West Devon Great Consols Mine* (1888) 38 Ch. D. 51.
(*o*) *Van Wart* v. *Wolley* (1823) Ry. & Moo. 4.

And so where it appears from the whole conduct by counsel of any particular proceeding that a particular fact is admitted between the parties, this may be given in evidence as an implied admission of the particular fact (*p*). But this general authority to make admissions may be curtailed by special instructions from the client, although, if such instructions should be disregarded, the counsel's want of authority would not debar the opposite party from using the admission, unless he had notice of its impropriety.

But the relation of counsel to his client is not that of an ordinary agent. The mode in which he conducts his client's business must be subject always to the control of the court in whom is vested the jurisdiction of doing justice between the parties. And hence, although *primâ facie* acts done within the apparent scope of the counsel's authority as above stated (*q*) will be binding on the client, the other side having given credit to his authority, yet where it is made clear that the counsel was acting in violation of his client's wishes and authority to his serious prejudice the court will in its discretion overrule the unauthorised act (*r*).

The same principle is of course applicable to solicitors. But, subject thereto, solicitors also have an implied authority in civil cases to make admissions on behalf of their clients, as for example for the purpose of obviating the necessity of proving any fact upon the trial, as where a solicitor gives a direct and formal admission of the execution of a deed, or of the dishonour of a bill, or where he makes propositions on behalf of his client (*s*). But, although this applies not only to express admissions but also to those which are made incidentally, it does not cover mere loose conversations which do not appear to be made by him in the exercise of his pro-

(*p*) *Stracy* v. *Blake* (1836) 1 M. & W. 163.
(*q*) See last page.
(*r*) *Neale* v. *Gordon Lennox* [1902] A. C. 465.
(*s*) *Young* v. *Wright* (1807) 1 Camp. 139.

fessional duty and to promote his client's advantage, although they may relate to the matters in controversy (*t*). In making admissions the solicitor is bound as towards his client to act honestly and with reasonable skill (*u*). But, even if his admission is unauthorised, the other side may still make use of it if he has no notice of the want of authority (*x*).

Such admissions however are not generally admissible in criminal cases. Thus in a prosecution for perjury where the solicitors on both sides had agreed to dispense with formal proofs, Lord Abinger C. B. refused to permit the case to be so proved, saying that he would allow no admissions unless made at the trial by the defendant or his counsel, and accordingly, in default of proper evidence, the defendant was acquitted (*y*). In cases of felony however it is the constant practice of the judges at the assizes to refuse to allow even counsel to make any admission (*z*).

(viii) *Parties who are Trustees or Agents.*—The extent to which a party may be bound by his admissions is sometimes limited by the character in which he sues or defends, as where he sues only as a trustee, agent, or representative of some other person beneficially interested in the subject-matter of the action. In such case only those admissions are receivable in evidence which were made during the period of such nominal party's interest and authority as such. Thus, although a next friend or guardian suing or defending on behalf of an infant has at least as much authority as a solicitor to make admissions during and for the purpose of the cause (*a*), yet as they do but sue as quasi-officers

(*t*) *Ibid.*; and *Parkins* v. *Hawkshaw* (1817) 2 St. 239; *Petch* v. *Lyon* (1846) 9 Q. B. 147.

(*u*) *Fray* v. *Vowles* (1859) 28 L. J. Q. B. 232.

(*x*) As to the period of such authority see *Wagstaff* v. *Wilson* (1832) 4 B. & Ad. 339; *Butler* v. *Knight* (1867) L. R. 2 Ex. 109.

(*y*) *R.* v. *Thornhill* (1838) 8 C. & P. 575.

(*z*) Phill. Ev. 10th ed. i. 391.

(*a*) *Ibid.* 364.

of the court and have no other interest in the subject-matter thereof, any admissions which they may have made before their appointment are not receivable against the infant (*b*). So too admissions made by a trustee in bankruptcy before his appointment are not admissible in evidence against those he represents (*c*). But in cases of this description so long as the interest lasts the ordinary rule applies. Thus, where a consignor of goods sued the shipowner for negligence in their carriage, but the person who had the substantial interest in the result was the consignee, it was held that admissions made by the consignor that the goods were stowed properly and in accordance with instructions were admissible (*d*). The same is true of the admissions of a husband who sues on behalf of his wife (*e*). And the rule will apply equally in the case of a trustee suing or defending on behalf of his *cestui que trust*, or in that of a banker who sues as the legal holder of a bill indorsed to him for the purpose of collection.

(ix) *Persons for whom the Parties are Trustees or Agents.*— Where an action is brought or defended by a nominal party on behalf of some other person in whom the beneficial interest in the proceedings is really vested, it is obviously just that admissions made by the latter should be binding on the party who represents him. Thus in an action by the master of a ship against a charterer upon a charter-party which the former has made on behalf of the shipowner, the defendant is entitled to give in evidence admissions made by the shipowner on whose behalf the master is suing (*f*). And where a defendant was sued in trover for a deed which he admitted that he was detaining on behalf of a third person interested therein, the declarations of such third person were held to be

(*b*) *Webb* v. *Smith* (1824) Ry. & Moo. 106.
(*c*) *Fenwick* v. *Thornton* (1827) M. & M. 51.
(*d*) *Bauerman* v. *Radenius* (1798) 7 T. R. 663.
(*e*) *Moriarty* v. *London, Chatham & Dover Rail. Co.* (1870) L. R. 5 Q. B. 314.
(*f*) *Smith* v. *Lyon* (1813) 3 Camp. 465.

admissible against him (*g*). So, too, admissions made by a *cestui que trust* are binding on the trustee who sues or defends on the former's behalf; although it is doubtful whether such an admission is receivable unless the person making it is the only one who stands to gain or lose by the event of the proceedings; it is at any rate clear that its operation, if received, would be confined to the interests of the person making it (*h*). The same rule has been applied where the plaintiff sues on a bill of exchange which has been indorsed to him solely for the purpose of suing on behalf of another (*i*). And it is in fact applicable in the case of all parties who are mere representatives of the interests of others.

(x) *Predecessors in Title.*—The same principle has also been extended to statements affecting property made by predecessors in title of the parties. Any statement made by the possessor of property of any description tending to limit in any way the complete and unfettered ownership thereof by him is deemed an admission, which may be given in evidence against any party who subsequently becomes entitled to it; and it makes no difference to the admissibility of such a statement whether the person who made it be living or not. Thus, where the plaintiff sued for trespass to a close of land which he claimed as his exclusive property, the defendant was held entitled to call a witness to prove that the plaintiff's father, from whom the plaintiff had derived his title, had admitted orally to the witness that his close was subject to common rights of pasture, such as the defendant now claimed, and that he had no right to enclose it; and this, notwithstanding that the father was living and in court at the time (*k*). Again, where the plaintiff brought

(*g*) *Harrison* v. *Vallance* (1822) 1 Bing. 45.

(*h*) *Doe* v. *Wainwright* (1838) 8 A. & E. 691; *May* v. *Taylor* (1843) 6 M. & G. 261.

(*i*) *Welstead* v. *Levy* (1831) 1 Moo. & Rob. 138.

(*k*) *Woolway* v. *Rowe* (1834) 1 A. & E. 114; cf. *Doe* v. *Pettett* (1821) 5

against his brother an action of trover for a watch, alleging it to be a gift to himself from their father, and the defendant denied the gift and proved that he had taken out letters of administration to his father's estate, it was held that the plaintiff was thereupon entitled to give evidence of oral declarations in his favour made by the father as to the ownership of the watch, since the defendant had given evidence to show that he claimed under him (*l*). On the same principle it has been held in actions by the indorsee against the maker of a promissory note that the admissibility on the defendant's behalf of admissions of defective title made by the indorser through whom the plaintiff claims, depends on the question whether the plaintiff became the holder of the note after it was due or under other circumstances which would entitle the defendant to say that he took no better title than his indorser had, and was therefore identified in interest with him (*m*). On this same principle a map is sometimes admissible as containing statements or matter adverse to the interests of the party whose predecessor made or adopted it (*n*).

The principle on which such admissions are receivable is expressed by saying that the person who made the admission and the party against whom it is tendered are privies in estate and interest, for the admission must directly affect the title or interest in the property of the person who makes it while he is still in possession of it. Hence a mere statement by the predecessor in title against his interest in other respects, as, for instance, that he is in debt, whence it might be inferred that he would be likely to part with or charge his

B. & A. 223; *Maddison* v. *Nuttall* (1829) 6 Bing. 226; *Meath* v. *Winchester* (1836) 3 Bing. N. C. 183.

(*l*) *Smith* v. *Smith* (1836) 3 Bing. N. C. 29.

(*m*) *Barough* v. *White* (1825) 4 B. & C. 325; *Beauchamp* v. *Parry* (1830) 1 B. & Ad. 89.

(*n*) *Doe* v. *Lakin* (1836) 7 C. & P. 481.

property, does not come within this rule (*o*), and an admission directly affecting his title but made by him after he had parted with the estate is equally inadmissible (*p*).

In the converse case, where the person who made the admission was not a predecessor in title of the party, but one who derived some limited estate from him, it would be unfair to hold the party bound by it unless it were specially authorised. Thus in an action by the owner of one close against the owner of the adjoining one, in which the plaintiff claimed the right to water his cattle at a pond on the defendant's land, and tendered in evidence an admission in his favour made by one to whom the defendant had let his land, it was held that, in the absence of evidence of the defendant's tenant having been authorised by him to make such statement, it was not admissible in evidence (*q*). And where, in a prosecution for obstructing a highway, the question was whether the way was public or private, a statement made by a former tenant and occupier, since dead, who had planted a willow to mark the boundary of the road, was rejected as inadmissible evidence by reason of the nature of his estate (*r*). On just the same principle—applied to the law of property—it is held that a tenant of premises cannot by permitting the enjoyment of some right over them by an adjoining owner create an easement as against his landlord unless the latter knows and acquiesces in the user (*s*).

The admissions discussed in this section should be compared with the Declarations against Proprietary Interest mentioned at a later page (*t*).

(*o*) *Coole* v. *Brahan* (1848) 3 Ex. 183, 185.

(*p*) *Doe* v. *Webber* (1834) 1 A. & E. 740; cf. *Pocock* v. *Billing* (1824) 2 Bing. 269, illustrating the same rule as applied to a bill of exchange.

(*q*) *Scholes* v. *Chadwick* (1843) 2 Moo. & Rob. 507; cp. *Papendick* v. *Bridgwater* (1855) 5 E. & B. 166; *Blandy-Jenkins* v. *Dunraven* [1899] 2 Ch. 121.

(*r*) *R.* v. *Bliss* (1837) 7 A. & E. 550.

(*s*) *Daniel* v. *North* (1809) 11 East, 372; *Wood* v. *Veal* (1822) 5 B. & Ad. 454.

(*t*) See pp. 192—194 below.

§ 6.—Interrogatories and Notice to admit Facts.

By the Rules of the Supreme Court a party to a civil cause is entitled during the pendency of an action and before the trial to call upon his opponent to make formal admissions of particular facts relevant to the issues, which, if made, will be admissible against the latter at the trial just as much as any informal admission of the kinds described in this chapter.

Rule 1 of Order XXXI provides that—

In any cause or matter the plaintiff or defendant, by leave of the court or a judge, may deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: provided also that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

Rule 2 of the same Order provides that—

On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the court or a judge. In deciding upon such application, the court or a judge shall take into account any offer, which may be made by the party sought to be interrogated, to deliver particulars, or to make admissions, or to produce documents relating to the matter in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the court or judge shall consider necessary, either for disposing fairly of the cause or matter or for saving costs.

These rules must be read subject to the important protection given to parties under the head of privilege (*t*), a protection based in some of its applications on the common

(*t*) See Chapter XIV of this Part, pp. 269—307 below.

law principle explained at the head of this chapter and expressed in the maxim "*Nemo tenetur se ipsum accusare*" (*u*).

The forms of the interrogatories and of the affidavit in answer thereto will be found in Appendix D (*x*).

Rule 4 of Order XXXII provides that—

> Any party may, by notice in writing, at any time not later than 9 days before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter, or issue only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within 6 days after service of such notice, or within such further time as may be allowed by the court or a judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the court or a judge certify that the refusal to admit was reasonable, or unless the court or a judge shall at any time otherwise order or direct. Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion, or in favour of any person other than the party giving the notice: provided also, that the court or a judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

The forms of the notice and of the admissions will be found in Appendix D (*y*).

Similar provisions to the above are in force in the County Court. See Rules 1 and 3 of Order XVI of the County Court Rules, 1903 and 1904, as to interrogation; and Rule 8 of Order IX as to notice to admit facts.

(*u*) See pp. 150, 151; also pp. 269—307, and especially pp. 272, 275, 306, 307.

(*x*) See p. 479.

(*y*) See p. 478.

CHAPTER III.

DECLARATIONS IN THE COURSE OF DUTY.

When a person in the regular course of his duty or office performs some business transaction and makes forthwith a return or record of it which he has no interest to falsify, such return or record is after his death evidence against all persons of the performance of the transaction, and is known as a Declaration in the Course of Duty (*a*). The guarantee of its credibility consists in the obligation to discharge the duty faithfully, and the accuracy which is generally produced by business routine.

A declaration in the course of duty, as all the other declarations discussed in the following chapters, must of course be duly proved by some admissible form of testimony, which will generally be direct oral evidence. The evidence in this particular case will consist of proof of the course of duty or office of the deceased declarant, his death, and the making of the declaration by him which, if written or signed by him, will necessitate the proof of his handwriting (*b*).

Such declarations may be either written or oral (*c*). Thus upon the prosecution of one Buckley for the murder of a police-constable named Green on the night of the 24th of February, 1873, in order to show the probability of the deceased and the prisoner having met on that night, the prosecution tendered evidence of an oral statement made by the constable in the course of his duty to his superior officer

(*a*) *Price* v. *Torrington* (1704) 1 Sm. L. C.; *Polini* v. *Gray* (1879) 12 Ch. D. 411, 429, 430; *Sturla* v. *Freccia* (1880) 5 App. Ca. 623, 640.

(*b*) See Introduction, pp. 6, 7.

(*c*) *Sussex Peerage* (1844) 11 Cl. & Fin. 113; *Stapylton* v. *Clough* (1853) 2 E. & B. 933.

on that day to the effect that he had received information that Buckley was at his old game of thieving again, and that he (the constable) was going that night to watch his movements; and it was held that the statement was admissible as a declaration in the course of duty (*d*). But almost all the examples of the rule will be found to consist of written entries.

The leading case with regard to these declarations is *Price* v. *Earl of Torrington* (*e*). There the plaintiff, being a brewer, brought an action against the Earl of Torrington for beer sold and delivered, and the evidence given to prove the delivery to the defendant was that according to the usual practice in the plaintiff's business his draymen came overnight to the clerk of the brewery and gave him an account of the beer they had delivered out, which he set down in a book kept for the purpose, to which the draymen set their names. The drayman who had delivered the beer in question was dead, but an entry of the delivery contained in the plaintiff's book, the signature to which entry was proved to be that of the deceased drayman, was tendered in evidence and admitted as a declaration made in the course of the drayman's duty. So in an action commenced on the 20th of April, 1815, on an attorney's bill, where the only question was whether a bill had been delivered according to the statute one month before action, the draft bill having been produced containing an indorsement in the handwriting of a deceased clerk of the plaintiff's in the following terms: "March 4th, 1815, delivered a copy to Mr. Peck," and it

(*d*) *R.* v. *Buckley* (1873) 13 Cox, 293. The authority of this case is however somewhat doubtful on another point, inasmuch as the declaration pointed to a future or intended act, whereas it has generally been held essential that such declarations should record something in fact done. In the later case of *Rowlands* v. *De Vecchi* ((1882) 1 C. & E. 10) where it was sought to prove the posting of a letter by an entry made by a deceased clerk in a book in which it was his duty to enter all letters *to be* posted, the entry was rejected by Day J.

(*e*) 2 Sm. L. C.

having been proved that the indorsement was upon the document on the date mentioned, it was held that this was sufficient *primâ facie* evidence of the due delivery of the bill (*f*).

The office or employment to which the duty is attached may be private, as in the case of an ordinary clerk; or public, as in that of a sheriff (*g*), or of a notary public (*h*), or a magistrate (*i*).

It is not enough that the entry has been made in the course of business; it is essential that it should also have been the duty of the declarant to make it. In an action brought against one C. J. Allen and another in order to obtain a declaration that the defendants were bound to indemnify the plaintiff against all liability in respect of 200 shares in the International Contract Company (in respect of which the plaintiff had been fixed upon the "B" list of contributories) upon the ground that the said shares had been vested in the plaintiff solely as trustee for the defendants, the plaintiff, in order to prove that the shares had been in truth purchased by the said Allen, tendered in evidence the day-book of one Griffiths, deceased, the stockbroker who had purchased the shares, as the plaintiff contended, on the defendant's behalf. The book contained the following entry:—

26th April, 1864.

	£	s.	d.
International Ct. 18 July			
Bot. for C. J. Allen			
200 Inter. Cont. 5 p.c—2/=1400	0	0	
½ commn. - - -	6	5	0
Stp. - - -	5	2	6

	£	s.	d.	£	s.	d.
C. Allen -	1406	5	0			
N. Morris -	1400	0	0			
				6	5	0

(*f*) *Champneys* v. *Peck* (1816) 1 St. 404; cf. *Doe* v. *Turford* (1832) 3 B. & Ad. 890, and *Mellor* v. *Walmsley* [1905] 2 Ch. 164.

(*g*) *Chambers* v. *Bernasconi* (1834) 1 C. M. & R. 347.

(*h*) *Poole* v. *Dicas* (1835) 1 Bing. N. C. 649.

(*i*) *Watson* v. *Little and another* (1860) 29 L. J. Ex. 267.

The witness who produced the book explained that the entry meant that on the 26th of April, 1864, two hundred shares with £5 paid on them were bought at £2 premium for £1,400 from Norman Morris, stockjobber, for C. J. Allen, and that C. J. Allen was charged £1,406 5*s.* for the purchase-money and half the commission, and that the 18th of July was the settling day. It was held that the entry was inadmissible on the ground that there was nothing to show that it was the duty of the broker as between himself and his client Mr. Allen to make any such entries (*k*).

The only apparent exception to this part of the rule is presented by the case of *Doe* v. *Turford* (*l*). There the question was whether the service of a notice to quit could be proved by means of a memorandum stating the fact and time of such service indorsed upon a duplicate of the notice produced from the attorney's office. It was proved that it was the usual course of practice in the office for clerks to serve notices to quit on tenants, and to make indorsements similar to that in question upon duplicates of the notices. In the case in question however the service had been effected, and the indorsement made, by the attorney himself, who had since died. It was held that his indorsement was admissible as a declaration in the course of duty. It appeared that in consequence of the absence of his clerk or for some other reason the principal had in this particular instance performed the clerk's duty for him, and it was held that his indorsement was tantamount to his clerk's, and the case has always been so explained (*m*).

It is not sufficient that the declarant should have had personal knowledge of the transaction recorded; it must be one that he himself has performed, and one of a class which

(*k*) *Massey* v. *Allen* (1879) 13 Ch. D. 558.

(*l*) (1832) 3 B. & Ad. 890.

(*m*) *Ibid.* pp. 895, 896; *R.* v. *Worth* (1843) 4 Q. B. 132, 138, 139; *Smith* v. *Blakey* (1867) L. R. 2 Q. B. 326, 333. Cf. *Hope* v. *Hope*, W. N. 1893, p. 20.

it was his specific duty to perform; and the entry, unlike a declaration against interest, must have been made at the time of or immediately after the performance of the transaction (*n*). The case of the *Henry Coxon* (*o*) is a good illustration of some of these points. It was an action by the owners of the steamship *Gange* against the owners of the *Henry Coxon* for damages in consequence of a collision between the two vessels in Sea Reach in the river Thames on the 12th of January, 1878. To rebut the plaintiffs' allegation of negligence the defendants tendered in evidence certain entries made in the log-book of the *Henry Coxon* which had been made therein on Monday, the 14th of January, 1878, two days after the collision, by the first mate who was since deceased. It was held that the entries were inadmissible upon the grounds (i) that the log-book could not as to these entries be considered as a contemporaneous declaration; (ii) that it was the interest of the first mate to represent that the collision had taken place in consequence of the bad navigation of the *Gange* and not of his own vessel, and (iii) that the entries were not confined to acts done by the first mate himself, but related to the conduct of other persons.

These declarations, unlike those against interest (*oo*), are not admissible as evidence of any other matters than the particular transaction which it was the duty of the declarant both to perform and to record, however intimately any such collateral matters may be incorporated in the statements.

The case of *Chambers* v. *Bernasconi* (*p*) is a strong instance of this distinction. In that case, in order to prove that the

(*n*) *Doe* v. *Turford* (1832) 3 B. & Ad. 890; *Brain* v. *Preece* (1843) 11 M. & W. 773; *Smith* v. *Blakey* (1867) L. R. 2 Q. B. 326; *Polini* v. *Gray* (1879) 12 Ch. D. 411; *Sturla* v. *Freccia* (1880) 5 App. Ca. 623, 640; *Mercer* v. *Denne* [1905] 2 Ch. 538.

(*o*) (1878) 3 P. D. 156.

(*oo*) See p. 186 below.

(*p*) *Chambers* v. *Bernasconi* (1834) 1 C. M. & R. 347; *Smith* v. *Blakey* (1867) L. R. 2 Q. B. 226, 332, 335; *Polini* v. *Gray* (1879) 12 Ch. D. 411, 419—422, 426 430.

arrest of the plaintiff took place not in Paddington, but in South Molton Street, a certificate of the arrest written and signed by the sheriff's officer who had effected it and since died, was tendered. It was as follows :—

> 9th November, 1825. Arrested Abraham Henry Chambers, the elder, only, in South Molton Street, at the suit of William Brereton.
>
> THOMAS WRIGHT.

The under-sheriff of Middlesex proved that the course of his office was to require a return in writing of the arrest and of the place where the arrest was made under the hand of the sheriff's officer making the arrest. But the Court of Exchequer Chamber held that though it might be the duty of the officer to make known to the principal the fact and even the day of the arrest and the entry might be admissible as evidence of those facts, it was not admissible to prove in what particular spot within the bailiwick the caption took place, that circumstance being merely collateral to the duty done. Blackburn J. in commenting on this case observed :—

> The reason of the distinction is not at first sight very obvious; but I think all the cases show that it is an essential fact to render such an entry admissible, that not only should it have been made in the due discharge of the business about which the person is employed, but the duty must be to do the *very thing* to which the entry relates, and then to make a report or record of it (*q*).

(*q*) See *Smith* v. *Blakey*, cited in last note.

CHAPTER IV.

DECLARATIONS AGAINST INTEREST.

§ 1. *Against Pecuniary Interest.*
§ 2. *Against Proprietary Interest.*

Declarations against interest are statements made by deceased persons adverse to their pecuniary or proprietary interest; and the guarantee of their credibility consists in the fact that they are thus opposed to the declarant's interest, since it is the general experience of mankind that statements so made are likely to be true (*a*). But declarations against interest in any other sense, as for instance an admission of liability to criminal prosecution, do not come within the rule (*b*).

§ 1. Against Pecuniary Interest.

A declaration is against the pecuniary interest of the declarant who makes it whenever it has the effect of charging him with a pecuniary liability to another, or of discharging some other person upon whom he would otherwise have a claim (*c*). It is immaterial that the declaration may prove, as judged by subsequent events at the time when it is sought

(*a*) *Middleton* v. *Melton* (1829) 10 B. & C. 317, 327; *Gleadow* v. *Atkin* (1833) 1 C. & M. 410, 425; *R.* v. *Birmingham* (1861) 31 L. J. M. C. 63, 67; *Bewley* v. *Atkinson* (1879) 13 Ch. D. 283, 297; cp. *Rowe* v. *Brenton* (1828) 3 M. & R. 267.

(*b*) *Sussex Peerage* (1844) 11 Cl. & Fin. 103, 113, 114.

(*c*) *Doe* v. *Robson* (1812) 15 East, 32; *Davis* v. *Lloyd* (1844) 1 C. & Kir. 275.

to be put in evidence, to be for the interest of the declarant's estate, provided that the entry is *primâ facie* against his interest, that is to say, that the natural meaning of the entry standing alone must have been against the interest of the man who made it. Thus, the executor of one Taylor sued J. Witham for a sum of £2,000 alleged to be due from him to the testator's estate for money lent; the defence was that the defendant had received the money as a gift; the plaintiff tendered in evidence a private account-book of his testator containing the following entries:—

1872. October 1.
J. Witham paid me three months' interest - - £20 0 0

And on another page:

1872. January.				
J. Witham acknowledge lone (*sic*) to this date			£2,000	0 0
1872. March.	Interest - - - - -		£20	0 0
July 8.	Interest. Paid me - - -		20	0 0
Oct. 1.	Interest. Paid me - - -		20	0 0
Dec. 27.	Paid interest - - - -		20	0 0
			80	0 0
1872. Dec. 27.				
Paid off £20.		Left -	£1,986	0 0

The defendant objected to the admissibility of the book on the ground that the tendency of the entries was to establish the claim for £2,000 in favour of the estate. But it was held by Jessel M. R. that, since the entries of the payments taken by themselves were at the time when they were made against the interest of the testator, all the entries were admissible, and the learned judge observed:—

Of course if you can prove *aliunde* that the man had a particular reason for making it, and that it was for his interest, you may destroy the value of the evidence altogether, but the question of admissibility is not a question of value. The entry may be utterly worthless when you get it, if you show any reason to believe that he had a motive for

making it, and that, though apparently against his interest, yet really it was for it; but that is a matter for subsequent consideration when you estimate the value of the testimony (*d*).

When once it appears that a declaration is against interest, the whole of the statement of which it forms part becomes admissible, even though it should contain a statement of other collateral matters which are not similarly against interest. Thus in the case just cited not only the entries of the receipt of the payments were admissible, but also that in the testator's favour by which he recorded the defendant's acknowledgment of the loan. This rule was laid down in the leading case of *Higham* v. *Ridgway* (*e*). There the question was whether one William Fowden junior was born before or after the 16th of April, 1768. The plaintiff, in order to prove that his birth was subsequent to that date, tendered in evidence the following entries from the day-book and ledger of a man-midwife who had attended the mother of William Fowden junior at his birth, and was since deceased:—

Day Book Entries.

22nd April, 1768.

38 (*f*) Richard Fallows' wife. Bramhall. Filius circa hor. 9, matutin. cum forcipe, &c. paid.

[*Then followed in the same page the entry in question, without any intervening date, viz.:*—]

Wm. Fowden junr.'s (*g*) wife, 79 (*f*) filius circa hor. 3 post merid. nat. &c.

(*d*) *Taylor* v. *Witham* (1876) 3 Ch. D. 605; *The Swiftsure* (1900) 82 L. T. 389.

(*e*) (1808) 2 Sm. L. C.

(*f*) The figures 38 and 79 referred to the corresponding entries in the ledger.

(*g*) This was the designation that time of the father of the William Fowden jun. in question.

LEDGER ENTRY.

Wm. Fowden junr., 1768.

Aprilis 22.	Filius natus, &c.		
	Wife - - - - - -	1 6	1
26th.	Haustus purg. - - - -	0 15	0
		2 1	1

Pd. 25th Oct., 1768.

It was held that all these entries were connected together as one whole, and that the entry as to the payment of the man-midwife's charges rendered them all admissible.

The question has several times arisen, in the case of written entries, as to what is to be deemed the whole statement within the meaning of this rule. It would seem that the same tests which have been stated in regard to admissions must be applicable here, namely, that the statement which is sought to be given in evidence as a part of the main statement must, if antecedent, have been incorporated in it by reference, and, if contemporary, have been virtually parcel of it (*h*).

Accordingly it is well settled that the discharging items of a debtor and creditor account do not make the charging items inadmissible, and may even be, if properly connected therewith, themselves admissible (*i*), and that it matters not that the ultimate balance is in favour of the declarant (*j*). On the other hand it is equally well settled that a set of accounts is not admissible as a whole merely because in some part of them there are entries against interest; the discharging items in order to be admissible must either be referred to in the charging items or so connected with them that they together form virtually one account or statement (*k*).

(*h*) Pages 159—161, above.
(*i*) *Rowe* v. *Brenton* (1828) 3 M. & R. 267.
(*j*) *Williams* v. *Geaves* (1838) 8 C. & P. 592.
(*k*) *Knight* v. *Waterford* (1840) 4 Y. & C. 283; *Doe* v. *Beviss* (1849) 7 C. B.

Therefore where an ancient roll found amongst the muniments of a manor containing the receiver's accounts of moneys received by him on behalf of the lord, followed by an account of moneys expended by him on behalf of the lord, was tendered as evidence of facts noticed in the items of discharge for which the receiver took credit in the account, the latter entries were rejected, although the charging items were admitted, because there was nothing in the accounts to connect the two sets of items, or to show that the receiver gave credit for any sum applied in discharge (*l*). On motion for new trial for improper rejection of evidence (which was refused) Maule J. said (*m*) :—

> The question then is whether items in that account, in which the reeve charges the lord and not himself, are to be admitted as evidence, merely because there are items on the other side of the account that are admitted. . . . I think . . . that the items of discharge in the accounts in question which were not referred to in, or necessary to explain, the items of charge, which were admitted and read, were properly rejected.

Cresswell J. said (*n*) :—

> Here the receiver's accounts were admitted to the extent to which he purported to charge himself. But then it was said, that the receiver's admissions of the receipts of money having been received, the accounts were also to be looked at for the purpose of seeing how he had disposed of the money. That however is a totally different matter. The statements on the one side and on the other may be so blended together, that the one cannot be read without the other; but it does not follow that in all cases the entire account must be read. If the discharging part of the account be necessarily resorted to for the purpose of explaining the charging part, it may be evidence. The manner in which the receiver disposed of money that had come to his hands, clearly was not necessary to explain his admission of its receipt.

456; cp. *Higham* v. *Ridgway* (1808) 2 Sm. L. C.; *Stead* v. *Heaton* (1792) 4 T. R. 669.

(*l*) *Doe* v. *Bevitt* (1849) 7 C. B. 456, at p. 463.

(*m*) *Ibid.* 512.

(*n*) *Ibid.* 508.

It is stated in many of the cases that in order to render the declaration admissible the declarant must have possessed peculiar means of knowing the facts stated (*o*). This phrase is somewhat vague. In regard to most Declarations it is direct personal knowledge which is required. And in the present class the particular statement which is against interest can hardly be based on anything but the direct personal knowledge of the declarant. But although the rest of the statement will probably be generally of the same character, it will not always be so. Even however where part of the statement is based on hearsay evidence it would seem that the rule by which the whole statement is to be admitted prevails to render it evidence.

Thus where the clerk who had kept the weighing-books of certain mines, in which were entered the quantities of ore raised and the names of the workings from which they had been gotten, was dead, and the books were tendered in evidence in order to show that a lessee of some of the mines had at a certain period received toll upon the ore raised from one particular mine, it was objected that the clerk's entries which both charged himself with the ore received and also stated from what particular mines the ore had been extracted, were inadmissible to establish the latter fact, it having been proved that when the ore was brought to the weighing-house by the mine-captains or tollers they were asked from which mine it had been raised. But the court held that it was not necessary that the deceased person should have had personal knowledge of the fact stated; that if the entry charged himself, the whole of it became admissible against all persons, and that the absence of such knowledge went to the weight not to the admissibility of the evidence (*p*). Assuming that

(*o*) *Higham* v. *Ridgway* (1808) 2 Sm. L. C.; *Doe* v. *Robson* (1812) 15 East, 32; *Middleton* v. *Melton* (1829) 10 B. & C. 228, 317; *Gleadow* v. *Atkin* (1833) 1 C. & M. 410.

(*p*) *Crease* v. *Barrett* (1835) 1 C. M. & R. 919, 923—925.

the rule is laid down in correct terms in the last-cited case (*q*), then this class of declarations (like some others) presents a departure from the general principle that declarations of deceased persons must express the direct personal knowledge of the declarant (*r*).

Where the fact that the declaration is against the declarant's interest does not clearly appear from the statement itself, as for instance where it does not show the declarant's character, without which it is not clear on what account or in what right the money was received, it is permissible to give independent evidence to supply this want, as by proving that the declarant was an agent or receiver on behalf of another, or that the money paid to him was not a gift but in discharge of a legal claim. Slight evidence will often be sufficient for this purpose. It may be that the book in which the entries occur clearly purports by its title or general description to be the book of a steward or receiver (*s*); or the same fact may appear from other entries in the same document; although this fact may not be inferred merely from the similarity of the book in question to other books which can be shown to be receiver's books (*t*).

A declaration against interest may be in writing or oral (*u*). If it be in writing it is not necessary that it should have been signed, if it can be shown either that the body of it was written by the person whom it purports to charge (*x*), or that

(*q*) But see per Lord Selborne L. C. in *Sturla* v. *Freccia* (1880) 5 App. Ca. at pp. 632, 633.

(*r*) *Ibid.*; and consider *Higham* v. *Ridgway* (1808) 10 East, 120; *Gleadow* v. *Atkin* (1833) 1 C. & M. 410, 423; *Trimblestown* v. *Kemmis* (1843) 9 Cl. & F. 780; *Sussex Peerage* (1844) 11 Cl. & F. 103, 113, 114; and *Bewley* v. *Atkinson* (1879) 13 Ch. D. 283, 297.

(*s*) *Exeter* v. *Warren* (1844) 5 Q. B. 773; *Doe* v. *Michael* (1851) 17 Q. B. 276.

(*t*) *Doe* v. *Thynne* (1808) 10 East, 206.

(*u*) *R.* v. *Birmingham* (1861) 31 L. J. M. C. 63; *Bewley* v. *Atkinson* (1879) 13 Ch. D. 283.

(*x*) *Barry* v. *Bebbington* (1792) 4 T. R. 514; *Exeter* v. *Warren* (1844) 5 Q. B. 773.

it has been adopted by that person, in whosesoever handwriting it may be (*y*); and in the latter case it is not necessary to call the agent who wrote it (*z*).

Nor is it necessary that such declarations should be contemporaneous with the fact recorded; it is sufficient that they are made at any subsequent time (*a*).

With regard to declarations stating the payment to the declarant of interest due upon a debt, it is evident that where the indorsement is of such date as to have the effect, if admitted in evidence, of preventing the operation of the Statute of Limitations, the entry is not wholly against the interest of the party making it, since although it acknowledges the payment of the interest, such payment has the effect of preventing the claim to the capital sum from being barred.

It has accordingly been decided that if the indorsement (or other acknowledgment) has been made before the statute has run against the debt, it is admissible as an entry against interest, but that where it has been made after the statute has run, it is inadmissible. In the leading case upon this subject a promissory note for £500, bearing date May 13th, 1815, was indorsed as follows:—

> Interest on this note paid up to 13th day of May, 1825.

It was held that the indorsement made after the statute had run was not evidence, and that the note was barred by the statute (*b*).

That decision was followed in the recent case of *Newbould* v. *Smith* (*c*), in which the facts were as follows:—A, in 1863, lent B £430 without any security save a deposit of deeds.

(*y*) See cases in last note, and *Doe* v. *Hawkins* (1841) 2 Q. B. 212.
(*z*) *Ibid.*
(*a*) *Doe* v. *Turford* (1832) 3 B. & Ad. 890, 897, 898.
(*b*) *Briggs* v. *Wilson* (1854) 5 De G. M. & G. 12.
(*c*) (1885) 29 Ch. D. 882.

A having died in 1884, his administrator sued B. There was no evidence that any interest had been paid since 1866, except an entry in A's books of £50 as paid for rent and interest in 1878, a date when the debt was barred. It was held that the entry was inadmissible as not being against interest (*d*).

It is a common practice for a record of payments made to be indorsed on the bond or contract creating the debt. In the case of debts resting on simple contract it is expressly enacted by 9 Geo. 4 c. 14 s. 3 (Lord Tenterden's Act) that—

> No indorsement or memorandum of any payment written or made after the time appointed for this Act to take effect upon any promissory note, bill of exchange, or other writing by or on the behalf of the party to whom such payment shall be made shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes (*e*).

It seems that the section only applies to cases where the indorsement is the only evidence of payment; where it can be corroborated by other evidence the indorsement is admissible (*f*).

§ 2. Against Proprietary Interest.

Any declaration made by one who is in possession of any description of hereditament tending to limit his interest therein to any less estate than the whole fee simple is admissible in evidence after his death as a statement against his proprietary interest (*g*). And *à fortiori* if it shows that he has no interest in the land whatever (*h*). This is based on

(*d*) *Newbould* v. *Smith* (1885) 29 Ch. D. 882. This case was taken to the Court of Appeal and House of Lords, and affirmed on grounds which do not affect the particular point discussed in the text.

(*e*) *I.e.* 21 Jac. 1 c. 16; and the Irish Act, 10 Car. 1 Sess. 2 Ch. 6.

(*f*) *Bradley* v. *James* (1853) 13 C. B. 822, 825.

(*g*) *Peaceable* v. *Watson* (1811) 4 Taunt. 16; *R.* v. *Birmingham* (1861) 31 L. J. M. C. 63; *R.* v. *Exeter* (1869) L. R. 4 Q. B. 341.

(*h*) *Gery* v. *Redman* (1875) 1 Q. B. D. 161.

the well-known rule of law, that a person in possession of land is presumed, until the contrary appears, to be the owner thereof in fee simple (*i*). The rule therefore is not applicable where the declaration simply relates to the limits of the land occupied by the declarant, since there is nothing to show that it is more against his interest to deny his possession of one close than it is to assert his possession of another (*j*). It is difficult to see on the other hand any objection in principle to treating declarations by a deceased occupier of land which admit the existence of an easement over it as being within the rule, since although there is no presumption of law that land is held free from easements, the admission of their existence might well be considered a statement against interest. It has however been decided otherwise in several cases. Thus where on an indictment for obstructing a way, alleged to be a public highway, the prosecution tendered a declaration by a deceased occupier of land over which the road in question ran, admitting the existence of the public way, it was held that such statement was inadmissible (*k*). It is true that the declarant in that case was only the tenant of the land, and that the rejection of the evidence was justified on the ground that its admission would contravene the rule that a landlord cannot be bound by a declaration of his tenant (*l*). But the decision also implies that the declaration of an occupier of land admitting an easement over it is not admissible as a declaration against interest within the meaning of the present rule; and it has been so understood.

As in the case of a declaration against pecuniary interest, as soon as the adverse interest is proved the whole statement becomes admissible. Thus in an action of ejectment the

(*i*) *Gery* v. *Redman* (1875) 1 Q. B. D. 161.

(*j*) *Crease* v. *Barrett* (1835) 1 C. M. & R. 919, 931.

(*k*) *R.* v. *Bliss* (1837) 7 A. & E. 550; cp. *Scholes* v. *Chadwick* (1843) 2 Moo. & Rob. 507.

(*l*) See p. 175 above.

plaintiff, in order to show the seisin of one Robert Farthing through whom he claimed, called a witness to prove that he had heard one Clark now deceased say that he rented the premises in question from the said Farthing; it was held that such evidence was admissible as soon as some preliminary proof had been given that the declarant was at the time of the statement in possession of the premises for which the ejectment was brought, although the only part of the statement which was, strictly speaking, against the declarant's interest was that which admitted that he was merely a tenant; and the name of the person whose tenant he was was merely collateral (*l*). In the same way statements by tenants have been admitted to prove not merely the fact that they were tenants, but also both the amount (*m*) and the payment (*n*) of the rent, and in like manner to establish the fact that the land is of copyhold tenure (*o*).

Such declarations may not only be either in writing or oral (*p*), but may also, like admissions, take the form of conduct, that is, such conduct as is consistent only with the declarant's holding an opinion adverse to his ownership of the fee simple in the property (*q*).

The declarations which are the subject of this section should be compared with Admissions by Predecessors in Title, which have been discussed at a previous page (*r*).

(*l*) *Peaceable* v. *Watson* (1811) 4 Taunt. 16.
(*m*) *R.* v. *Birmingham* (1861) 31 L. J. M. C. 63.
(*n*) *R.* v. *Exeter* (1869) L. R. 4 Q. B. 341.
(*o*) *Doe* v. *Jones* (1808) 1 Camp. 367.
(*p*) See the several cases cited in this chapter.
(*q*) *Gery* v. *Redman* (1875) 1 Q. B. D. 161.
(*r*) See pp. 173—175.

CHAPTER V.

DYING DECLARATIONS.

WHENEVER a person's death is the subject of a criminal charge, any statement made by the deceased relating to the circumstances from which his death ensues is admissible in evidence, provided that it was made at a time when death was in fact impending and the declarant had himself lost all hope of recovery (*a*). These declarations are thus confined to prosecutions for murder or manslaughter, and are inadmissible on any other issue, even though it should relate to the violence which led to the declarant's death (*b*). The guarantee of their credibility consists in the belief of impending death, which is considered to be a sanction as powerful as that involved in the oath, the declaration being deemed equivalent to the sworn testimony of the living witness (*c*).

If the declarant had any hope, however slight, of recovery, the declaration will be inadmissible. Thus on a trial for murder a written declaration of the deceased made under the following circumstances was tendered in evidence for the prosecution: the declaration had been made on oath to a magistrate's clerk about thirteen hours before death; the

(*a*) *R.* v. *Mead* (1824) 2 B. & C. 605; *R.* v. *Hind* (1860) 29 L. J. M. C. 147; *R.* v. *Jenkins* (1869) L. R. 1 C. C. R. 187.

(*b*) See *R.* v. *Lloyd* (1830) 4 C. & P. 233, which was a case of robbery with violence.

(*c*) *R.* v. *Drummond* (1784) 1 Lea. 337; *R.* v. *Woodcock* (1788) *ibid.* 500; *Ashton's Case* (1837) 2 Lew. C. C. 147; *R.* v. *Scaife* (1836) 1 Moo. & Rob. 551.

clerk asked the deceased before he took down her statement whether she felt she was likely to die; she said, "I think so —from the shortness of my breath;" her breath was then extremely short; the clerk said, "Is it with the fear of death before you that you make these statements? have you any present hope of your recovery?" She said, "None." The clerk then wrote out her statement and added to it the above conversation in the form of a statement by the deceased, but he omitted the word "present" before "hope." He then read over to the deceased what he had written, and she then added the words "at present" after "hope" and signed the declaration. It was held that the statement was not admissible in evidence, as it did not appear to have been made under a settled hopeless expectation of death, inasmuch as the deceased had expressly qualified the words "no hope" by inserting after them the words "at present" (*d*).

Kelly C. B. in his judgment said:—

> The result of the decisions is that there must be an unqualified belief in the nearness of death, a belief without hope that the declarant is about to die. If we can look at reported cases and at the language of learned judges, we find that one has used the expression "every hope of this world gone" (*e*); another "settled hopeless expectation of death" (*f*); another "any hope of recovery, however slight, renders the evidence of such declarations inadmissible" (*g*). We, as judges, must be perfectly satisfied beyond any reasonable doubt that there was no hope of avoiding death.

Moreover, the declarant's expectation must be that death will follow not ultimately but soon (*h*). This is involved in the very title of these declarations, and it is obvious that if the declarant believed that he would have subsequent oppor-

(*d*) *R.* v. *Jenkins* (1869) L. R. 1 C. C. R. 187.
(*e*) Per Eyre C. B. *R.* v. *Woodcock* (1788) 1 Lea. C. C. at p. 502.
(*f*) Per Willes J. *R.* v. *Peel* (1860) 2 F. & F. at p. 22.
(*g*) Per Tindal C. J. *R.* v. *Hayward* (1833) 6 C. & P. at p. 160.
(*h*) *R.* v. *Woodcock* (1788) 1 Lea. C. C. 500, 502; *R.* v. *Crockett* (1831) 4 C. & P. 544; *R.* v. *Reaney* (1857) D. & B. 151; *R.* v. *Goddard* (1882) 15 Cox, 7.

tunities of correcting his declaration the particular guarantee of credibility would be in part removed. It is not necessary that the declarant should have given express utterance to his expectation of death (*i*); it may be inferred from other circumstances, as for instance from the general tenor of the declarant's remarks (*k*), or the obviously dangerous condition in which he lies (*l*). But if once the declarant makes his declaration in the settled expectation of approaching death, neither the fact that he lingers longer than was expected, nor the fact that at some subsequent time he entertains fresh hopes of recovery, will render the declaration inadmissible (*m*).

The declaration must be confined to the circumstances which led to the declarant's death, and to such evidence thereof as the declarant would himself have been competent to give in the witness-box; statements therefore which are founded on hearsay will be rejected (*n*); and if the declarant is too young to understand the idea of a future state the whole declaration will be inadmissible (*o*). It will not however render a declaration inadmissible that it was made in answer to leading questions addressed to the declarant (*p*), although such a mode of taking the declaration may affect its weight.

The declaration may be oral or written, and in any form; statements on oath which do not comply with the conditions

(*i*) *R.* v. *Bonner* (1834) 6 C. & P. 386; *R.* v. *Morgan* (1875) 14 Cox, 337.

(*k*) *R.* v. *Spilsbury* (1835) 7 C. & P. 187.

(*l*) *R.* v. *Johns* (1790) 1 Lea. C. C. p. 504, note (*a*); *S. C.*, 1 East, P. C. 357.

(*m*) *R.* v. *Hubbard* (1881) 14 Cox, 565.

(*n*) *R.* v. *Sellers* (M.S.) O. B. coram Rooke J. 1796, Carr. Cr. Law, 3rd ed. 1828, p. 233. In *R.* v. *Scaife* (1836) 1 M. & R. 551, a declaration containing a statement of opinion merely was admitted, but the opinion was in favour of the accused.

(*o*) *R.* v. *Pike* (1829) 3 C. & P. 598. In like manner it was held, before 7 & 8 Vict. c. 85, that the declaration of an attainted convict was inadmissible; *R.* v. *Drummond* (1784) 1 Lea. C. C. 337; see p. 126, note (*x*).

(*p*) *R.* v. *Fagent* (1835) 7 C. & P. 238; *R.* v. *Smith* (1865) L. & C. 607.

requisite to make them admissible as depositions have not unfrequently been proved as dying declarations (*q*).

The statement of an injured and dying man is frequently taken before a justice of the peace, out of court, under the provisions of sect. 17 of the Indictable Offences Act, 1848 (*r*), or sect. 6 of 30 & 31 Vict. c. 35, which provide for the perpetuation of testimony in criminal cases. Such depositions are taken on oath or affirmation, and are not known as dying declarations; but as the scope of them is very similar, it may be convenient here to refer to the sections under which they are taken, which will be found below (*s*).

(*q*) Cp. *R.* v. *Woodcock* (1788) 1 Lea. C. C. 500; *R.* v. *Jenkins* (1869) L. R. 1 C. C. R. 187.

(*r*) 11 & 12 Vict. c. 42.

(*s*) See below, pp. 255, 258.

CHAPTER VI.

DECLARATIONS ACCOMPANYING ACTS.

When it is relevant to prove that some act was done with a particular intent, on which its true legal character depends, declarations made by the person doing it, either at the time or immediately afterwards, have frequently been held admissible, in proceedings in which the declarant is neither party nor witness, to prove what that intent was (*a*). It is a medium of proof which does not appear, like most of those which are known as Declarations, to possess any special sanction of credibility; Parke B. speaks of it with others as having been recognised from very early times on the ground of necessity and convenience (*b*). Illustrations of it may be found in many branches of the law. Thus where questions arise concerning domicil (which consists in the fact of a person's residence in a particular place with the intention that it shall be his home), declarations made by the person so residing as to his intention to stay or remove are admissible (*c*). Again, where A sued B for the loss occasioned by supplying goods to one C upon the faith of representations as to C's character which B had made, it was held that evidence might be given on behalf of A that he had been heard to say when he supplied C with the goods that he did so in consequence of the favourable account which B had given of

(*a*) *Wright* v. *Doe* (1837) 7 A. & E. 313, 361, 384.

(*b*) *Ibid.* p. 384. The passage is cited at p. 9 above.

(*c*) *Hodges* v. *Beauchesne* (1858) 12 Moo. P. C. 285, 325; *Doucet* v. *Geoghegan* (1878) 9 Ch. D. 441.

him (*d*). So where questions have arisen as to whether a person has been keeping house or absenting himself with the intent to hinder or defraud his creditors, and has so committed an act of bankruptcy, it has always been held that statements contemporaneous with the act or made shortly afterwards by the alleged bankrupt might be given in evidence, in proceedings brought by his trustees, in proof of the act of bankruptcy on which their title to sue depended (*e*); and the same has been held where the question was whether an assignment which a bankrupt had made constituted a fraudulent preference (*f*).

In a case where the question was whether a conveyance which contained, as part of the description of the parcels granted, the words "the common piece on the Mind" had operated to convey to the plaintiff's predecessor in title a certain piece of land which the plaintiff claimed, the plaintiff tendered in evidence an oral statement made by the person who had sold the land to his predecessor in title at the time of the conveyance. The vendor and the purchaser had gone over the ground together, and the vendor had pointed out to the purchaser the particular piece of land now claimed by the plaintiff as being "the common piece on the Mind" which he was purchasing. The evidence was received, and its reception was afterwards upheld by the court, as a declaration accompanying an act (*g*). If the declaration had been tendered merely for the purpose of showing where and what the land known as the "common piece on the Mind" was, it could hardly have been held admissible; but it seems to have been admitted rather on the supposition that the conveyance of *some* property known by that particular descrip-

(*d*) *Fellowes* v. *Williamson* (1829) M. & M. 306.

(*e*) *Bateman* v. *Bailey* (1794) 5 T. R. 512; *Rawson* v. *Haigh* (1824) 2 Bing. 99; *Newman* v. *Stretch* (1829) M. & M. 338.

(*f*) *Ridley* v. *Gyde* (1832) 9 Bing. 349; approved in *Rouch* v. *G. W. Rail. Co.* (1841) 1 Q. B. 51.

(*g*) *Parrott* v. *Watts* (1877) 47 L. J. C. P. 79.

tion could be regarded as an ambiguous act on the part of the vendor which might be explained by proof of his intention at the time of the grant. On the other hand, where the plaintiff sued for infringement of patent, and the defence was want of novelty by reason of one Oatley having before the date of the patent sold products similar to that produced by the plaintiff's patent, the plaintiff tendered evidence of a statement of the said Oatley, who was not himself called, made at the time of his selling a small portion of such product, to the effect that it was new and that he wished it to be kept secret. But it was held that such evidence was inadmissible, as neither the nature, object nor motives of Oatley's act in selling the product were in any way the subject of the inquiry (*h*).

The declaration must be contemporaneous with or closely follow the act which it is said to accompany. It has been held that even the interval of a few hours is sufficient to render it inadmissible (*i*). It is true that in one case (*k*) a declaration was admitted which was separated by an interval of nearly four weeks from the act which it qualified; but although this decision was subsequently approved (*l*), it is safer to regard it as exceptional in its circumstances, and therefore not to be followed as a general precedent.

Such declarations are admissible notwithstanding that the declarant is still living.

It has often been said that the true ground on which these declarations are admitted is that they constitute part of the res gestæ (*m*). But their similarity both in name and

(*h*) *Hyde* v. *Palmer* (1863) 32 L. J. Q. B. 126.

(*i*) *Lees* v. *Marton* (1832) 1 Moo. & Rob. 210; cf. *Rawson* v. *Haigh* (1824) 2 Bing. 99, 103, 104.

(*k*) *Ridley* v. *Gyde* (1832) 9 Bing. 349.

(*l*) *Rouch* v. *G. W. Rail. Co.* (1841) 1 Q. B. 51.

(*m*) *Robson* v. *Kemp* (1803) 4 Esp. 233; *Rawson* v. *Haigh* (1824) 2 Bing. 99; *Lees* v. *Marton* (1832) 1 Moo. & Rob. 210; *Rouch* v. *G. W. Rail. Co.* (1841) 1 Q. B. 51.

character to other media of proof seems sufficient justification for placing them in this Part, and it may be noted that it would seem to have been the later view of Parke B., as indicated in his considered judgment in the case of *Wright* v. *Doe*, that they are to be classed along with the other declarations which form exceptions to the rule against hearsay (*n*).

There is one very anomalous head of hearsay evidence, which may be referred to here, as perhaps coming nearer to this class of declarations than to any other. It consists of the declarations, and conduct equivalent to declarations, of wife (*o*) or paramour (*p*) as to the legitimacy or illegitimacy of offspring of the wife, held to be admissible when the question in issue is whether such offspring is or is not legitimate. This head of evidence, in common with the other declarations which form the subject of this chapter, illustrates the difficulty which has been experienced in applying with uniform certainty the distinction between res gestæ and narrative.

(*n*) (1837) 7 A. & E. 313, 384. And see above, p. 9, for the passage here referred to.

(*o*) *Aylesford Peerage* (1885) 11 App. Ca. 1.

(*p*) *Burnaby* v. *Baillie* (1889) 42 Ch. D. 282.

CHAPTER VII.

DECLARATIONS AS TO STATE OF HEALTH.

Whenever there is an issue as to some person's state of health at a particular time, the statements of such person at that time or soon afterwards with regard to his bodily feelings and symptoms are admissible in evidence.

This medium of proof does not appear, like most of those which are known as Declarations, to possess any special sanction of credibility; like declarations accompanying acts it would seem to have been admitted on the ground of necessity and convenience; and its similarity in name and character to the others justifies its being placed in this Part.

The following illustrations of it will suffice: Where the prisoner was indicted for poisoning her husband, in order to prove the state of health of the deceased a few days prior to the day of his death a witness was called who had seen him about that time, for the purpose of proving a conversation which had then taken place between himself and the deceased with regard to the latter's state of health at that time. The evidence was objected to, but the objection was overruled (*a*).

In another case, the leading decision on the subject, the plaintiff sued upon a policy of insurance that had been granted to him by the defendants upon his wife's life, and the question was whether the warranty contained in the policy, that the wife at the time when it was effected was in good health, was true. The defendants in support of their plea that the warranty was false called a witness, Susannah

(*a*) *R.* v. *Johnson* (1847) 2 C. & K. 354.

Lees, who had visited the deceased woman a few days after the date on which she had procured her certificate of good health for the purpose of the policy, and proposed to examine her as to statements made by the deceased woman on that occasion about her state of health at that time. The evidence was objected to, but Graham B. admitted it "as in general any opinion of the state of health of a person must partly be formed on the accounts which such person gives of his complaints." The witness then proved that she found the plaintiff's wife in bed at 11 o'clock in the forenoon, that the latter stated that she was very poorly, that she had been to Manchester a day or two before, that her husband had been insuring her life, that she was not well nor fit to go when she went, that it would be ten days before the policy could be returned, and that she was afraid she could not live till it was made, and her husband could not get the money. It was held by the Court, on an application for a new trial on the ground of misreception of evidence, that it had been properly admitted (*b*).

This exception has sometimes been spoken of as part of the res gestæ (*c*), but the leading case would seem to show that it is admitted as a medium of proof, and that the guarantee of its credibility consists in the spontaneity of the declaration (*d*). In any view it would seem that such statements are only admissible when they are contemporaneous with, or closely follow, the symptoms to which they relate. In *Aveson* v. *Kinnaird* (*b*) the symptoms described by the declarant extended back over several days; in the case of *R.* v. *Johnson* (*f*) the declaration would seem to have had relation to contemporaneous symptoms.

There seems to be no ground for confining the admissibility

(*b*) *Aveson* v. *Kinnaird* (1805) 6 East, 188.
(*c*) *Doe* v. *Ridgway* (1820) 4 B. & A. 53, 55; cp. 6 East, 193, 194.
(*d*) *Aveson* v. *Kinnaird*, at p. 196; but see *ibid.* pp. 193, 194.
(*f*) (1847) 2 C. & Kir. 354.

of such declarations to cases where the declarant is dead. Lawrence J. in his judgment in *Aveson* v. *Kinnaird* (*g*), speaking of course at a date when the parties were incompetent to testify, said:—

> As to the general ground of objection to the evidence as hearsay it is in every day's experience in actions of assault that what a man has said of himself to his surgeon is evidence to show what he suffered by reason of the assault (*h*).

And indeed the opinion that they are part of the res gestæ could hardly have been put forward at all if the fact that the declarant was living had been held to render them inadmissible.

(*g*) *Aveson* v. *Kinnaird* (1805) 6 East, 188, at p. 198.

(*h*) Cf. *Thompson* v. *Trevanion* (1693) Skinn. 403, an action by husband and wife for the wounding of the wife in which the court admitted evidence of the wife's complaint. *S. C.* cited below at p. 350.

CHAPTER VIII.

DECLARATIONS AND REPUTATION AS TO MARRIAGE.

§ 1. *Declarations as to Marriage.*
§ 2. *Reputation as to Marriage.*

Marriage is a status for the valid creation of which there must be a contract between the parties executed in accordance with certain prescribed formalities. But on grounds of policy it is well settled that it is not essential, in order to prove that A and B are or were husband and wife, to show that all the requisite formalities were complied with. In all cases, save where the proof of the marriage is essential to the establishment of a criminal charge, as that of bigamy, a marriage may be proved by the Declarations of the parties to the alleged marriage, and their conduct to each other, and also by that general recognition and Reputation of their marriage among those who know them which is consequent thereon (*a*).

The weight of such evidence may be affected by the absence of testimony to prove that the prescribed formalities were complied with, but the Marriage Acts which prescribe them were not intended to displace or otherwise alter the proof of marriage by these means (*b*). The presumption in

(*a*) *Leader* v. *Barry* (1795) 1 Esp. 353; *Morris* v. *Miller* (1767) 1 W. Bl. 632; *Doe* v. *Fleming* (1827) 4 Bing. 266; cp. *Hoggan* v. *Craigie* (1839) Mac. & Rob. 942, 965; *Breadalbane Case* (1867) L. R. 1 Sc. App. 182, 211.

(*b*) *Read* v. *Passer* (1795) Pea. 230; *St. Devereux* v. *Much Dew Church* (1762) 1 W. Bl. 367.

favour of a valid marriage, where these circumstances occur, is so strong that it can only be rebutted by clear proof that no marriage in fact took place (*c*).

The rule embraces both the declarations and conduct of the alleged husband and wife, and also the general reputation of their marriage among those acquainted with them which is gradually founded on it. The first of these two heads of evidence is almost invariably, though not necessarily and in all circumstances, accompanied by the second. But as their characteristics differ it will be convenient to discuss them separately.

§ 1. Declarations as to Marriage.

The statements and conduct of the parties, implying the legality of their union and the legitimacy of their children, have sometimes been regarded upon an issue of marriage or no marriage as res gestæ (*d*). But inasmuch as such statements and conduct are admissible although they may have taken place long after the date of the marriage, it appears difficult to reconcile this view with the ordinary meaning of res gestæ. Moreover this head of evidence so closely resembles the declarations, express and by conduct, which are admitted in pedigree cases, as well as evidence of reputation of marriage (to be mentioned in the next Section), both of which have always been considered as media of proof, that it seems most consistent with principle to treat of it in this place.

When the parties to the alleged marriage are deceased, their conduct towards each other and towards their children has constantly been admitted as evidence of their marriage and of the legitimacy of their offspring (*e*).

(*c*) *Piers* v. *Piers* (1849) 2 H. L. C. 331, 362; cp. *Hervey* v. *Hervey* (1773) 2 W. Bl. 877.

(*d*) *Dysart Peerage* (1881) 6 App. Ca. 489, 499—504; per contra, see judgment in *Hervey* v. *Hervey*, *supra*.

(*e*) *Piers v. Piers* (1849) 2 H. L. C. 331; *Goodman* v. *Goodman* (1859) 28

Such evidence may consist of the terms in which the parties have spoken or written to or of each other and their children in conversation, in letters, in documents of title, on any solemn occasion (as *e.g.* in the witness-box or on registering a birth or a death), or in any other circumstances. Evidence of this description is equivalent to a continuing assertion of the legal character of the relationship between them, and closely resembles the declarations by parents as to the legitimacy or illegitimacy of their children referred to in the next chapter (*f*).

But this head of evidence is not confined, like declarations as to pedigree, to cases where the parties are dead. The evidence is equally admissible although one or both of them should be living; the fact that in such cases more direct proof of the celebration of the marriage is not forthcoming affects the weight, not the admissibility, of the evidence. Thus on a prosecution for bigamy the defendant, a woman, was charged with having married one Gotobed in 1848, and afterwards in 1858, while he was still living, having married another man named Wilson. The defence was that at the time of the marriage in 1848 Gotobed was already married to another woman named Guy who was then alive. The evidence of this marriage, which appears to have been received without objection, was as follows: a witness was called who had known Gotobed at Toronto in Canada in 1837 and for several years subsequently, and who remembered him returning about the year 1843 to Toronto, after a temporary absence, accompanied by the woman Guy. Gotobed then stated to him that this woman was his wife; he treated her as his wife, and everyone else regarded her as such (*g*). In this case it will be noted that both parties to the marriage

L. J. Ch. 745; *Lyle* v. *Ellwood* (1874) 19 Eq. 98; *Collins* v. *Bishop* (1878) 48 L. J. Ch. 31.

(*f*) See below, p. 215.

(*g*) *R.* v. *Wilson* (1862) 3 F. & F. 119.

which was thus proved were strangers to the proceedings in which the evidence was given, and it would seem that at the time of the prosecution Gotobed was still living. The evidence however is equally admissible on behalf of the husband or wife when he or she is a party to the record. Thus in an action of debt in 1847, where the defence was that the defendant was a married woman, the defendant was allowed to call evidence to prove that she had for a period of several years lived as wife with a person named Potts, who was still living, and had passed under the name of Mrs. Potts (*h*).

These cases must be distinguished from those where the husband or wife is a party to the record and such evidence is tendered against him or her by way of an admission (*i*).

§ 2. Reputation as to Marriage.

Reputation here means the opinion of relatives, friends, and neighbours, that the persons in question are, as their conduct imports, a married couple. It must not be merely the opinion of A and B in favour of the marriage, opposed perhaps to a contrary opinion entertained by C and D, but must be general in its character (*k*). It is not however necessary that the reputation should be unanimous in order to be admissible; the marriage may be established by a clear preponderance of reputation in its favour (*l*).

It may be proved by any witness who from his residence in the place where it exists, or his connection with the family or other circumstances, can prove the tenor of it from his own

(*h*) *Woodgate* v. *Potts* (1847) 2 C. & K. 457; cp. *De Thoren* v. *Att.-Gen.* (1876) 1 App. Ca. 686.

(*i*) *Munro* v. *De Cheminant* (1815) 4 Camp. 215; cp. *Wilson* v. *Mitchell* (1813) 3 Camp. 393; *R.* v. *Flaherty* (1847) 2 C. & K. 782.

(*k*) *Cunninghams* v. *Cunninghams* (1814) 2 Dow, 482, 511, 514.

(*l*) *Lyle* v. *Ellwood* (1874) 19 Eq. 98; *Haynes* v. *Haynes* (1906) 94 L. T. 431.

direct personal knowledge. So soon as a witness admits that he is only speaking from information given to him by some third person, his evidence becomes inadmissible (*m*). If however a witness merely says, "I heard that A and B were man and wife," and is not cross-examined as to the meaning or source of his statement, it may be presumed that it is founded on a reputation held by himself in common with others (*n*).

This evidence (like evidence of cohabitation as man and wife) is not confined to cases where the parties to the alleged marriage are deceased; it is admissible while they are living in cases where they are strangers to the proceedings (*o*), and seems on principle to be equally admissible where one of them is a party to the proceedings, subject to the qualification mentioned above in the case of criminal charges (*p*).

(*m*) *Shedden* v. *Att.-Gen.* (1860) 30 L. J. P. M. & A. 217, 231, 232.

(*n*) *Evans* v. *Morgan* (1832) 2 C. & J. 453. For a case where minutes of an inquiry held by the provost and fellows of a college as to the status of one of the fellows was rejected, see *Fox* v. *Bearblock* (1881) 17 Ch. D. 429.

(*o*) *Doe* v. *Fleming* (1827) 4 Bing. 266.

(*p*) See p. 206.

CHAPTER IX.

DECLARATIONS AS TO PEDIGREE.

Upon questions of pedigree the statement of a deceased person, whether based on his own personal knowledge or on family tradition, is admissible in evidence, provided that the declarant is proved to be related to the person about whose family relations the statement is made and that the declaration was made *ante litem motam.*

This exception to the rule against the admissibility of hearsay is due to the frequent difficulty from lapse of time of proving family relationships by means of direct oral evidence or any other medium of proof than the hearsay handed down by members of the family (*a*). The guarantee of its credibility is said to consist in the fact that the declaration was the natural effusion of one who had peculiar opportunity and interest as a member of the family to state correctly matters relating to its genealogy, and that it was made upon an occasion when his mind stood even without bias to exceed or fall short of the truth (*b*).

A pedigree ordinarily means a simultaneous statement of a succession of births, marriages and deaths making up a family genealogy; but a pedigree case or question arises within the meaning of this rule whenever there is an issue

(*a*) *Higham* v. *Ridgway* (1808) 10 East, 109, 120; *Vowles* v. *Young* (1806) 13 Ves. 140, 143; *Sturla* v. *Freccia* (1880) 5 App. Ca. 623, 641; *Dysart Peerage* (1881) 6 App. Ca. 489, 503.

(*b*) *Whitelock* v. *Baker* (1807) 13 Ves. 511, 514; *Monckton* v. *Att.-Gen.* (1831) 2 Russ. & Myl. 147, 159; *Berkeley Peerage* (1811) 4 Camp. 401, 406.

as to the fact or degree of relationship between any two persons. And relationship here comprehends not only relationship in the popular sense by consanguinity or affinity, but also any legal relationship consequent thereon, and involving rights connected with the devolution of property, such as heirship or rights of succession. Moreover since the proof of a particular relationship often depends on the proof of some specific fact, such as a birth, marriage or death, or the date or place of such event, or some incident connected therewith, or the place of residence of some particular person or family, or other matters of family history, these facts are also regarded as matters of pedigree within the meaning of the rule when they thus tend to prove a relationship which is in question (*c*). Thus where in an administration action the question was whether two children were legitimate, declarations contained in letters of their reputed father, since deceased, stating their exact ages and thereby making it clear that they must have been born before the date of his marriage, were admitted to prove their illegitimacy (*d*). In an action of ejectment the case was this: a former owner of the property in question had had three sons, born at one birth, and named Stephanas, Fortunatus, and Achaicus. Stephanas had died without issue. The plaintiff claimed through Fortunatus; and the question was whether he or Achaicus was born first. The plaintiff tendered in evidence declarations by the father to the effect that Achaicus was the youngest of the three and that he had taken these names from St. Paul's Epistles (where they occur in the above order (*e*)); also declarations of a deceased

(*c*) *Monckton* v. *Att.-Gen.* (1831) 2 Russ. & Myl. 147, 156; *Betty* v. *Nail* (1856) 7 Ir. C. L. 17.

(*d*) *Re Turner* (1885) 29 Ch. D. 985. Cp. *Kidney* v. *Cockburn* (1831) 2 Russ. & Myl. 167; cp. *Herbert* v. *Tuckal* (1663) T. Raym. 84, cited in *Roe* v. *Rawlings* (1806) 7 East, 279, 290; and commented on in *Haines* v. *Guthrie* (1884) 13 Q. B. D. 818, 822.

(*e*) 1 Cor. ch. 16, v. 17.

relative of the family, made shortly after the birth, to the effect that she was present at the birth, and upon the birth of the second child had taken a string and tied it round its arm to distinguish it; and these declarations were admitted (*f*). So declarations have been admitted to prove that a person of a particular name was resident in a particular place when that fact was relevant for the purpose of proving a step in a genealogy (*g*). On the other hand, neither the relationship between different persons, nor the dates of their births, marriages or deaths can be established by this medium of proof, where the question in issue is not one of pedigree within the meaning of this rule (*h*). Thus in an action by reversioner against tenant for the term of three lives for use and occupation of the land after the alleged expiration of the lives, the question was whether one of the *cestuis que vie* was dead; it was held that the reputation which existed upon that point in his family was not admissible, the question not being one of genealogy (*i*). And in an action for goods sold and delivered, to which the defence of infancy was pleaded, the date of the defendant's birth being in question, it was held that a declaration made by his deceased father was not admissible in evidence (*k*). And declarations tending to prove the place of birth have been rejected on the same grounds (*l*).

Before a declaration tending to prove relationship between two persons can be given in evidence it is necessary to prove by some means other than the declaration itself that the declarant is related to one of those two persons, since otherwise it would be possible for a stranger by merely claiming

(*f*) Vin. Abr. Ev. T. b. 91.

(*g*) *Rishton* v. *Nesbit* (1844) 2 Moo. & Rob. 554; *Shields* v. *Boucher* (1846) 1 De G. & Sm. 40.

(*h*) *Haines* v. *Guthrie* (1884) 13 Q. B. D. 818.

(*i*) *Whittuck* v. *Waters* (1830) 4 C. & P. 375.

(*k*) *Haines* v. *Guthrie* (1884) 13 Q. B. D. 818; cp. *Figge* v. *Wedderburn* (1842) 6 Jur. 218.

(*l*) *R.* v. *Erith* (1807) 8 East, 539.

alliance with a family to put himself in a position to affect the rights of its members (*m*). But it is not necessary to prove that he is related to them both, for this would involve the absurdity of requiring proof of the very question in issue as a preliminary to giving the evidence which is tendered to prove it (*n*). The relationship of the declarant which has thus to be proved must be a legitimate one, but there is no limit as to its remoteness; and for the purpose of this rule husband and wife are deemed to be related to each other (*o*). Hence the husband is a competent declarant in regard to his wife's family (*p*), and the wife in like manner in regard to her husband's (*q*); but the wife's relatives cannot make competent declarations as to the husband's family, nor the husband's relatives as to the wife's family, for the reason that (except in the case of husband and wife) the relationship must be a blood relationship (*r*). The declarations of those who are connected by illegitimate ties with the family to which the declaration relates are also inadmissible on the ground that a bastard is in law *filius nullius* (*s*), and the declarations of all friends or dependants, however intimate, are equally inadmissible, on the same ground that there must be a lawful blood relationship (*t*). The preliminary proof of this relationship must be such as to satisfy the judge on whose decision the admissibility of the evidence depends, and will not necessarily be of such a strict character as would be requisite for the proof of fact in issue.

(*m*) *Monckton* v. *Att.-Gen.* (1831) 2 Russ. & Myl. 147; *Doe* v. *Randall* (1828) 2 Moo. & P. 20, 24.

(*n*) *Monckton* v. *Att.-Gen.* (1831) 2 Russ. & Myl. 147, 156, 157.

(*o*) *Davies* v. *Lowndes* (1813) 7 Sc. N. S. 141, 181; *Shrewsbury Peerage* (1857) 7 H. L. 1, 23.

(*p*) *Doe* v. *Harvey* (1825) Ry. & Moo. 297; *Fowles* v. *Young* (1806) 13 Ves. 140.

(*q*) *Shrewsbury Peerage* (1857) 7 H. L. 1, 23, 26.

(*r*) *Ibid.*

(*s*) *Doe* v. *Barton* (1837) 2 Moo. & Rob. 28.

(*t*) *Johnson* v. *Lawson* (1824) 2 Bing. 86.

Where the question in issue happens to be the relationship of the declarant himself to some other person, the following problem arises: is the question to be deemed to be a question as to the declarant's family only, or as to the other person's family only, or as to the family of both? If it is deemed to be a question relating to the declarant's family only, then his declaration must be admissible forthwith; for to speak of preliminary evidence to prove that he is related to himself would be absurd. Again if it is deemed to be a question relating to both families, which seems to be the true account of the matter, on the principle laid down in *Monckton* v. *The Attorney-General* (*u*), the party tendering the evidence should be free to treat the declaration as one relating to the declarant's family, and, as before, to tender the declaration forthwith. It is only on the strained hypothesis of regarding the declaration as relating solely to the family of the other person that it can become necessary to tender evidence of the declarant's relationship to such other person as a condition precedent to the admissibility of the declaration. The cases however present on this matter a strange diversity of opinion.

Thus it has always been held that the declarations of a deceased father or mother are admissible to prove the legitimacy or illegitimacy of their children (provided that they do not contravene the rule which prohibits on grounds of public policy their giving evidence of non-access after marriage), as, for instance, by proving that the children were born before the date of the marriage (*x*), or by disproving the existence of any marriage at all (*y*). In like manner declarations have been admitted to prove that a particular person is the sister of the declarant (*z*). In this case it was expressly held that no evidence could be necessary to connect

(*u*) (1831) 2 Russ. & Myl. 147, 156, 157.
(*x*) *Goodright* v. *Moss* (1777) 2 Cowp. 591; *Re Turner* (1885) 29 Ch. D. 985.
(*y*) *Murray* v. *Milner* (1879) 12 Ch. D. 845.
(*z*) *Smith* v. *Tebbitt* (1867) L. R. 1 P. & D. 351.

the declarant with her own family. It will be noticed that this decision involves the admissibility of declarations as to the marriage of the declarant's parents and the declarant's own legitimacy. So declarations have been admitted to prove that the declarant himself is illegitimate and has no relatives whatever, without apparently any preliminary proof being required as a condition of admitting the declaration (*a*). In a recent case an application was made for the grant of administration to the estate of a deceased person whose Christian name and the date of his birth and death were unknown. It was proved that his mother, who was dead, had stated to an old friend and to an old nurse, that she had given birth to a boy who had died at the age of twelve months, and before the birth of a certain other child. No other evidence concerning the child could be obtained, but the grant was made by the court upon this evidence alone (*b*).

On the other hand there are several cases in which, perhaps sometimes without discussion as to the necessity of such preliminary evidence, the court has clearly proceeded on the assumption that, in some cases at any rate, before a declaration is admissible to prove the relationship of some other person to the declarant, preliminary evidence thereof, independent of the declaration itself, must first be given. Thus it has been held that a declaration as to the declarant's own legitimacy is admissible after some *primâ facie* evidence of that fact has first been given, and that it is no objection to the preliminary decision by the judge of this question that it is the very question in issue in the case (*c*). So it has been held that a declaration to the effect that the declarant was legally married is not admissible until some preliminary

(*a*) *Proc.-Gen.* v. *Williams* (1862) 31 L. J. P. M. & A. 157; followed in *Re Perton* (1885) 53 L. T. N. S. 707.

(*b*) *In the goods of Thompson* (1887) 12 P. D. 100.

(*c*) *Doe* v. *Davies* (1847) 10 Q. B. 314; *Hitchins* v. *Eardley* (1871) L. R. 2 P. & D. 248; cp. *Berkeley Peerage* (1811) 4 Camp. 401, 403. See form of questions, p. 403, and per Lord Mansfield, 416.

proof of the marriage has been given (*d*). In one case the court has held that a declaration stating that a particular person was the illegitimate son of the declarant's brother was inadmissible, on the ground apparently that the declaration related to the family of the illegitimate son to whom the declarant had no legal relationship and not to that of his father (*e*); but this case seems irreconcilable with the other authorities.

The declaration must have been made *ante litem motam* (*f*). The mere existence of the situation out of which the dispute subsequently arises does not render a declaration inadmissible; nor on the other hand is actual litigation necessary to exclude it; but so soon as a controversy has actually arisen which would naturally create a bias in the mind of one standing in the relation of the declarant, all subsequent declarations become inadmissible (*g*); and it is immaterial whether the declarant is or is not aware of the controversy (*h*). But declarations made before any dispute has arisen, although with the express view of precluding controversy, are not on that account inadmissible (*i*). Hence it has been held that depositions made for the purpose of another suit are inadmissible if the same point was in issue (*k*), but otherwise not (*l*). But the previous contro-

(*d*) *Proc.-Gen.* v. *Williams* (1862) 31 L. J. P. M. & A. 157.

(*e*) *Crispin* v. *Doglioni* (1863) 32 L. J. P. M. & A. 109.

(*f*) *Berkeley Peerage Case* (1811) 4 Camp. 401; *Monckton* v. *Att.-Gen.* (1831) 2 Russ. & Myl. 147.

(*g*) *Monckton* v. *Att.-Gen.*, at p. 160; *Shedden* v. *Att.-Gen.* (1860) 30 L. J. P. M. & A. 217, 235. For good illustrations of what constitutes *litis contestatio* see *Butler* v. *Mountgarret* (1856) 6 Ir. C. L. 77; 7 H. L. Ca. 633; *Frederick* v. *Att.-Gen.* (1874) L. R. 3 P. & D. 270.

(*h*) *Berkeley Peerage* (1811) 4 Camp. 401, 417.

(*i*) *Ibid.*; and *Goodright* v. *Moss* (1777) 2 Cowp. 591.

(*k*) *Berkeley Peerage* (1811) 4 Camp. 401, questioning *Goodright* v. *Moss* (1777) 2 Cowp. 591.

(*l*) See *Lyle* v. *Ellwood* (1874) 19 Eq. 98.

versy, to render the declaration inadmissible, must have been on precisely the same point (*m*).

It is not necessary that the declaration should contain only matters within the personal knowledge of the declarant. They may be based on statements made to him by a relative who has such personal knowledge (*n*), or they may be based on tradition involving any number of degrees of hearsay so long as it is the tradition of deceased members of the family and not of strangers (*o*). Nor is it necessary that the declaration should state with exactitude the degree of relationship; its failure to do so will affect its weight and not its admissibility (*p*). Nor that the evidence should have any greater precision than the case fairly admits of; thus in an action of ejectment, where the question was whether, as the plaintiff alleged, one Thomas Griffin had died without issue, the plaintiff called an elderly lady, one of the family, to prove that Thomas had many years before, when a young man, gone abroad and according to the repute of the family had afterwards died in the West Indies, and that she had never heard in the family of his having been married. It was held by the court, upon an application for a new trial, that this was evidence upon which the jury were entitled to find that Thomas had died unmarried (*q*). But if, instead of being founded on family hearsay or tradition, the declaration is extracted solely from different documents which are not produced, it will be inadmissible, since it is no more than a reproduction of documents which might indeed be good evidence of reputation themselves, but ought for that purpose to be produced in court (*r*).

(*m*) *Shedden* v. *Att.-Gen.* (1860) 30 L. J. P. M. & A. 217, 236.

(*n*) *Doe* v. *Davies* (1847) 10 Q. B. 314.

(*o*) *Goodright* v. *Moss* (1777) 2 Cowp. 591, 594; *Whitelock* v. *Baker* (1807) 13 Ves. 511, 514; *Monckton* v. *Att.-Gen.* (1831) 2 Russ. & Myl. 147, 164, 165.

(*p*) *Vowles* v. *Young* (1806) 13 Ves. 140, 147.

(*q*) *Doe* v. *Griffin* (1812) 15 East, 293.

(*r*) *Davies* v. *Lowndes* (1843) 6 M. & G. 471; overruling *S. C.* 5 Bing. N. C. 161.

It follows from what has been said that such declarations are equally admissible whether they are brought home to a particular member of the family or are shown to have been recognized and adopted by the family generally. They may moreover be in any form, either oral or by conduct or in writing. Examples of declarations by conduct are where a parent regularly treats a child as legitimate (*s*), or as illegitimate (*t*), as where he says that he does not regard him as a member of his family and omits all mention of him in his will (*u*). Written declarations may be contained in letters (*x*), wills (*y*), deeds (*z*), family Bibles, or any other book or paper (*a*). Where these are relied on merely as the declarations of those who wrote them, the handwriting must of course be identified in order to connect it with the declarant alleged to have written it (*b*), and this is true even of ancient documents, as for instance a pedigree a hundred years old, if without proof of handwriting it cannot be connected with a competent declarant (*c*). But such documents may often become admissible on the ground that they have been adopted and recognized by persons other than those who actually wrote them. Thus, inasmuch as the family Bible is in the nature of a family record, to which all the members of the family have access, the entries contained in it are admissible as declarations even though their handwriting cannot be proved, on the ground of its general recognition as a family

(*s*) *Berkeley Peerage* (1811) 4 Camp. 410, 416.

(*t*) *Goodright* v. *Moss* (1777) 2 Cowp. 591.

(*u*) *Robson* v. *Att.-Gen.* (1842) 10 Cl. & F. 471, 498, 499.

(*x*) *Re Turner* (1885) 29 Ch. D. 985; *Butler* v. *Mountgarret* (1856) 6 Ir. C. L. 77.

(*y*) *Murray* v. *Milner* (1879) 12 Ch. D. 845; *Doe* v. *Pembroke* (1809) 11 East, 504.

(*z*) *Smith* v. *Tebbitt* (1867) L. R. 1 P. & D. 354.

(*a*) *Berkeley Peerage* (1811) 4 Camp. 401, 417.

(*b*) *Slaney* v. *Wade* (1835) 1 My. & Cr. 338; *Tracy Peerage* (1843) 10 C. & F. 154.

(*c*) *Fitzwalter Peerage* (1843) 10 C. & F. 193.

record (*d*). And it is on the same ground that the courts have treated as declarations pedigrees or portraits hung up in family mansions, statements contained on tombstones or monumental brasses (*e*), and ancient coats of arms such as the arms of the Knights of the Garter in the Chapel Royal at Windsor (*f*).

(*d*) *Hubbard* v. *Lees* (1866) L. R. 1 Ex. 255, 258.

(*e*) *Goodright* v. *Moss* (1777) 2 Cowp. 591; *Monckton* v. *Att.-Gen.* (1831) 2 Russ. & Myl. 147, 163; *Slaney* v. *Wade* (1836) 7 Sim. 595.

(*f*) *Shrewsbury Peerage* (1857) 7 H. L. 1.

CHAPTER X.

REPUTATION AS TO PUBLIC AND GENERAL RIGHTS.

§ 1. *Reputation.*
§ 2. *Presentments of Customary Courts.*
§ 3. *Verdicts, Judgments, and Depositions.*

§ 1. Reputation.

Upon any issue as to the existence of a public or general right the statements of persons who were interested in such right and have since died are admissible in evidence, although based on hearsay and tradition of others who came before them and were also interested, provided that such statements are an expression of the common opinion and report of those concerned in the matter, that they state a general conclusion and not a particular fact, and that they were made before the controversy arose in which it is sought to make use of them. This exception therefore involves the admission of hearsay to any number of degrees; not only does the witness who brings the evidence into court state that which another person, the declarant, has said, but the declarant's own statement must also embody not his own individual knowledge or belief alone but also the concurring opinions of others similarly interested to himself; and these opinions in their turn may be based in part on earlier traditions extending back through any number of generations. This is what is understood in this connection by the term Reputation: the common hearsay of those interested in handing down from one to another the tradition of a right, the origin of

which can no longer be proved by direct oral evidence (*a*). And such evidence is of course equally admissible to affirm or to refute an alleged right of this description (*b*). The guarantee of its credibility consists in the concurrence of a large number of persons, all interested in, and therefore likely to ascertain the truth of, an opinion which, if untrue, would be surely challenged (*c*).

Public rights are those in which all the subjects of the King are interested, as for instance rights of highway (*d*), of taking tolls on the highway (*e*), of landing on a river bank (*f*), of using ports (*g*), ferries, and the like. General rights are those in which some class of the community has a common interest, as for example, those which are based on the customs of manors (*h*), parishes (*i*), or cities (*k*), or which are connected with the boundaries of counties (*l*), hamlets (*m*), and manors or the ancient divisions of manors (*n*).

When it is said that the persons from whom the reputation proceeds must be interested, this means that they must be either entitled to enjoy or liable to submit to the right in question, or that they must be so situated that their material interests may be affected by its exercise, or that in some other respect they are so concerned with such right that it

(*a*) *Higham* v. *Ridgway* (1808) 10 East, 109, 120.

(*b*) *Drinkwater* v. *Porter* (1835) 7 C. & P. 181.

(*c*) *Wright* v. *Doe* (1837) 7 A. & E. 313, 360, 361; in H. L. 4 Bing. N. C. 489, 528; *R.* v. *Bedfordshire* (1855) 4 E. & B. 535, 542.

(*d*) *Read* v. *Jackson* (1801) 1 East, 355; *R.* v. *Bliss* (1837) 7 A. & E. 550.

(*e*) *Brett* v. *Beales* (1829) M. & M. 416.

(*f*) *Drinkwater* v. *Porter* (1835) 7 C. & P. 181.

(*g*) *Sailing Ship "Garston" Co.* v. *Hickie* (1885) 15 Q. B. D. at p. 595.

(*h*) *Doe* v. *Sisson* (1810) 12 East, 62; *Crease* v. *Barrett* (1835) 1 C. M. & R. 919.

(*i*) *Berry* v. *Banner* (1793) Pea. 156; *Evans* v. *Merthyr Tydfil U. D. C.* [1899] 1 Ch. 241.

(*k*) *Layborn* v. *Crisp* (1838) 4 M. & W. 320.

(*l*) *Evans* v. *Rees* (1839) 10 A. & E. 151.

(*m*) *Thomas* v. *Jenkins* (1837) 6 A. & E. 525.

(*n*) *Barnes* v. *Mawson* (1813) 1 M. & S. 77.

may be presumed that they had both the means and the motive for giving a true account of the matter (*o*). Thus in the case of a public right, in which all the King's subjects are interested, such as a highway or a ferry, it would seem that reputation from anyone is strictly speaking receivable, although of course it would be almost worthless unless it came from persons who were shown to have some means of knowledge, as by living in the neighbourhood or frequently using the road in question (*p*). So where the question was as to the existence of a particular mining custom in the ancient assessionable manor of Tewington in the Duchy of Cornwall, and the plaintiff to prove the custom tendered as evidence of reputation written answers of the conventionary tenants of the manor to interrogatories relating to the said custom addressed to them by commissioners, the defendant objected that they were inadmissible because the tenants as such had nothing to do with the mines; but it was held that since the minerals to which the custom was alleged to attach lay beneath their estates, and they were more likely than others living at a distance to become adventurers, and consequently subject to its operation, they were sufficiently connected with the subject to render their answers admissible declarations, especially as they appeared to have been consulted as persons having a competent knowledge upon the matters inquired into (*q*). So where the issue was whether Newcastle was within the Hundred of Broxtowe, the plaintiff tendered as evidence in the nature of reputation five orders of sessions made some 170 years previously from which it more or less directly appeared that it was so included. It was objected by the defendants that it had not been proved that the justices who made the orders resided in the county or had

(*o*) *Newcastle* v. *Broxtowe* (1832) 4 B. & Ad. 273; *Crease* v. *Barrett* (1835) 1 C. M. & R. 919, 929—930; *R.* v. *Bedfordshire* (1855) 4 E. & B. 535, 542.

(*p*) *Crease* v. *Barrett* (1835) 1 C. M. & R. 919, 929.

(*q*) *Ibid.* Compare this case with *Talbot* v. *Lewis* (1834) 1 C. M. & R. 495.

any peculiar knowledge on the subject; but the court upheld the admission of the evidence on the ground that from the nature and character of their office alone they must be presumed to have sufficient acquaintance with the subject to which their declarations related (*r*).

Should the declaration express merely the declarant's own opinion it would obviously not comply with the definition of reputation. In order to do this it should not only be the declaration of one of the members of that body whose common opinion makes the reputation current in their day, but should also express the concurrent opinion of himself and all others who are similarly interested. But if the declarant's circumstances were such that he was apparently competent to testify as to what the common report upon the subject was, it will be presumed, till the contrary is shown, that his utterance was an expression of opinion common both to himself and others. For if the mere possibility that the deceased person's inference might proceed from some defective premises were sufficient to exclude it, this head of evidence would be entirely put an end to (*s*). Thus in an action for trespass to the plaintiff's close in the hamlet of Mortomley, which the defendants justified by the plea of a public way across it, the plaintiff called a witness who proved that forty years ago a public meeting was held in the hamlet to consider whether the road should be repaired or not, and that a document (which was produced in court from the custody of the surveyor of highways) was thereupon signed by himself and twelve other inhabitants since deceased. This document, which was admitted after objection, stated the opinion of those who signed it to be that the road was not and ought not to be a highway. On an application for a new trial on the ground that the document ought not to have been admitted because it did

(*r*) *Newcastle* v. *Broxtowe* (1832) 4 B. & Ad. 273; 1 N. & M. 601; compare *Richards* v. *Wood* (1831) 2 B. & Ad. 245; and see *Mercer* v. *Denne* [1905] 2 Ch. 538.

(*s*) *R.* v. *Bedfordshire* (1855) 4 E. & B. 535, 544.

not contain anything which the parties to it had received as reputation from others, it was held that it had been rightly admitted. Lord Denman C. J. said:—

I do not agree that it is necessary for persons giving an opinion as to the publicity of a way to state that they found themselves on reputation, although their statements ought in reality to be founded on some reputation. The statement of each of the deceased persons was reputation to some extent (*t*).

Not only must the declaration express the common report as opposed to an individual opinion, but this common report or reputation must assert not particular or individual facts tending to prove or disprove the right, but a general conclusion as to the existence of the right itself; it must be, so to speak, a general verdict not only of all the persons, but also as to the general effect of all the facts (*u*). Thus upon an indictment for alleged obstruction to a highway, where the question was whether the way was a public or private one, the prosecution called a witness to prove that one Ramplin, deceased, who in his lifetime occupied the meadow over which the way ran, had planted a willow there at a particular spot thirty years ago. The counsel for the prosecution then asked the witness what Ramplin had said, when he planted the willow, about his planting it. The question was objected to, but admitted; and the witness answered that Ramplin said he planted it to show where the boundary of the road was when he was a boy. The defendant having lost the verdict applied for a new trial, which the court granted on the ground of the misreception of this evidence. Coleridge J. said:—

It is a rule that evidence of reputation must be confined to general matters and not touch particular facts. To try whether the declaration here was admissible according to that rule, let it be severed from the fact of planting which took place at the same time. Then it stands

(*t*) *Barraclough* v. *Johnson* (1838) 8 A. & E. 99.
(*u*) *Berkeley Peerage* (1811) 4 Camp. 401, 415.

that Ramplin said he planted the tree for a certain purpose; namely, to show the boundary. That is a particular fact; and evidence given of it is like proof of old persons having been heard to say that a stone was put down at a certain spot, or that boys were whipped, or cakes distributed, at a particular place, as the boundary; which statements would not be admissible (*x*).

The judgments delivered in this case left it doubtful whether if the declaration had contained no statement about the planting of the tree, but had related solely to the boundary line of the highway, it would still have been inadmissible. This question has been settled by a recent decision (*y*). In that case the defendant was indicted by a local authority for having obstructed a highway namely the Great North Road, by enclosing certain land alleged to form part of it, within the parish of Finchley. The prosecutors tendered in evidence a map attached to an inclosure award made in 1814, which purported to show the boundaries of the road at that date as comprising *inter alia* the strip enclosed by the defendant. The enclosure commissioners had no authority to define the limits of the highway and no part of the defendant's lands were allotted by them, so that the map could only be regarded as a declaration by a member of the public as to the reputed limits of the road. The map was admitted in evidence, after objection on the part of the defendant, and a verdict was given against him; but the Divisional Court held that the evidence had been wrongly admitted and granted a new trial. Cave J. said:—

Inasmuch as the map was made by one of the public it could not have been excluded if it had been tendered as evidence on the point whether the Great North Road was or was not a highway; but that point was not in dispute. The authorities establish that, although hearsay evidence is good evidence of reputation in matters of public

(*x*) *R.* v. *Bliss* (1837) 7 A. & E. 550, 556; cp. *Outram* v. *Morewood* (1793) 5 T. R. 121, 123; *Nicholls* v. *Parker* (1805) 14 East, 331; *Cooke* v. *Banks* (1826) 2 C. & P. 478; *Crease* v. *Barrett* (1835) 1 C. M. & R. 919, 930.

(*y*) *R.* v. *Berger* [1894] 1 Q. B. 823.

interest, it is not good evidence of particular facts from which an inference of fact may be drawn in respect of individual rights. In the present case the map would be good evidence of reputation that there was a public road in the direction shown on the map, if the contest were whether the land in question was a highway or not, but it was not good evidence of the boundaries of the highway.

The effect of this case seems to be that the physical existence of a way over a particular spot, when disputed, cannot be proved by reputation; where however the existence of the way over it is admitted or proved by other evidence, reputation is admissible to prove the public character of it (*z*).

It is necessary to the admissibility of declarations of this description that they should be made, like those admitted in pedigree cases, before the dispute has arisen in regard to which they are tendered in evidence (*a*). And by dispute is meant not the litigation but the controversy from which it originated (*b*). And the declarations in such cases will not be the less inadmissible because the declarant was unaware of the controversy (*c*). But the litigation, to have this effect, must be upon the precise point to which the declaration refers; it will not be sufficient that it was merely closely connected with it (*d*).

Declarations of this description, like the others we have mentioned, may be either oral (*e*), as statements made in course of a perambulation of boundaries (*f*), or written; and if in writing, in any form, as, for instance, written resolutions

(*z*) Note the language of Patteson J. in *R.* v. *Bliss*. See also *Pipe* v. *Fulcher* (1858) 28 L. J. Q. B. 12, per Wightman J. at p. 14.

(*a*) *R.* v. *Cotton* (1813) 3 Camp. 444; *Berkeley Peerage* (1811) 4 Camp. 401, 416; *Richards* v. *Bassett* (1830) 10 B. & C. 657.

(*b*) *Berkeley Peerage* (1811) 4 Camp. 401, 417.

(*c*) *Ibid.*

(*d*) *Newcastle* v. *Broxtowe* (1832) 4 B. & Ad. 273, 280; cp. *Freeman* v. *Phillips* (1816) 4 M. & S. 486.

(*e*) *Thomas* v. *Jenkins* (1837) 6 A. & E. 525.

(*f*) *Weeks* v. *Sparke* (1813) 1 M. & S. 679, 689; *Woolway* v. *Rowe* (1834) 1 A. & E. 114; see above, p. 60, below, p. 231.

passed at a public meeting (*g*), statements contained in deeds (*h*), or in orders of sessions (*i*), or ancient surveys for which statutory authority cannot be proved so as to constitute them public documents (*j*) or statements contained in the recitals of private acts of parliament (*k*). A map or plan is a form of statement, combining diagram and description, which ordinarily is proved by the direct oral evidence of the mapmaker himself (*l*). But maps may also be adduced as evidence of reputation whenever they can be shown to fulfil the necessary conditions stated in this chapter. This is often however no easy matter, as the decisions show. On an indictment against inhabitants of a parish for non-repair of a highway, the defendants contended that the highway was not within their parish, and called a surveyor, who produced a parish map about thirty-five years old, made by himself upon the information of an old man who showed him the parish boundaries; it was held not to be evidence without proof of the death of the old man (*m*). In other cases the courts have rejected the evidence of maps as reputation on the ground that the mapmakers were not shown to have had any particular knowledge of the subject or locality (*n*). Even the ordnance survey is not admissible in evidence, without the consent of the parties, save in proof of the boundaries of counties and

(*g*) *Barraclough* v. *Johnson* (1838) 8 A. & E. 99.

(*h*) *Brett* v. *Beales* (1829) M. & M. 416; *Plaxton* v. *Dare* (1829) 10 B. & C. 17.

(*i*) *Newcastle* v. *Broxtowe* (1832) 4 B. & Ad. 272.

(*j*) *Freeman* v. *Read* (1863) 32 L. J. M. C. 226, 228.

(*k*) *Carnarvon* v. *Villebois* (1844) 13 M. & W. 313. See below, pp. 21, 239, 460, as to Acts of Parliament.

(*l*) *R.* v. *Milton* (1843) 1 C. & K. 58; cp. *Pollard* v. *Scott* (1791) Pea. 18.

(*m*) In a few cases maps may be given in evidence for some purposes as public documents: for example, the tithe apportionment map, and maps annexed to and forming part of enrolled deeds and inclosure awards. As to these, see below at pp. 442, 444, 446, 448.

(*n*) *Hammond* v. *Bradstreet* (1854) 10 Ex. 390; cp. *Pipe* v. *Fulcher* (1858) 28 L. J. Q. B. 12.

other divisions of the country (*o*), and the manner of its preparation does not necessarily render it admissible as reputation. In a case where the plaintiffs claimed rights of common and the boundaries of a parish or vill were in dispute, ordnance maps and old maps from the British Museum were tendered as evidence to prove such boundaries, but were rejected by Kay J.

It was argued that hearsay evidence and evidence of reputation is admissible to prove the position of parish boundaries, and that therefore all these maps should be received. As to the greater part of them I am not informed how or on what information the boundary was laid down. None of them probably was made with the same care in this respect as the Ordnance map, and it is obvious that nothing like the amount of evidence on the question was produced for the purpose of that map which has been given before this court. In my opinion these maps are not admissible as evidence in such an action as this; if they were, they amount to no more than a statement of the opinion of the particular mapmaker upon such information as he obtained at the time (*p*).

The best way to prove ancient rights is to prove particular acts and usage, as far back as living memory goes, and then adduce evidence of reputation in regard to the preceding time (*q*). It is not however essential to the admissibility of reputation that there should be any evidence of modern user; the absence of it only affects the weight, not the admissibility of such evidence (*r*).

(*o*) See the Ordnance Survey Act, 1841 (4 & 5 Vict. c. 30); and see below, p. 460.

(*p*) *Bidder* v. *Bridges* (1885) 54 L. T. 529; cp. also the remarks of Pigot C. B. in *Tisdall* v. *Parnell* (1863) 14 Ir. C. L. R. at p. 28.

(*q*) *Anglesea* v. *Hatherton* (1842) 10 M. & W. 218, 239.

(*r*) *Crease* v. *Barrett* (1835) 1 C. M. & R. 919, 930; *Dunraven* v. *Llewellyn* (1850) 15 Q. B. 791, 804.

§ 2. Presentments of Customary Courts.

In certain cases the presentments of manorial and other like courts founded on ancient custom are evidence in the nature of reputation of the matters recorded in them.

This of course is subject to the condition that the court was duly constituted. Thus a survey of a seignory or lordship, which had been granted to Oliver Cromwell, taken by Commissioners whom he had appointed, "being assisted therein by some tenants and officers of the said seignorie," was held not to be admissible in support of a claim by a subsequent owner of the seignory to a customary payment, which it recorded, of fourpence per wey for every wey of coals transported out of the seignory (*s*). "If indeed it had appeared distinctly from the finding of a jury of the manor or of persons connected with the manor, so as to know its customs, that there was an ancient and customary payment of fourpence per wey for all coal carried over the bar to seaward, that would have been admissible as evidence of reputation, because authenticated by the opinion of a competent jury."

The admissibility of these presentments is also subject to the condition that they relate to a matter over which the customary court had jurisdiction. A presentment that certain land within the manor was not the freehold of A, a tenant of the manor, but was parcel of the waste, was held not admissible; the ownership of the freehold was held not to be within the jurisdiction of the homage, and it was besides a particular fact, and not a matter of general or public right (*t*). In 1834 some labourers from Carmarthenshire, being on Rossilly sands in the parish of Gower and turning up the sand with their hands, found a great number of Spanish dollars. The lord of the manor brought an action against

(*s*) *Beaufort* v. *Smith* (1849) 4 Ex. 450. Compare with this the case of *Freeman* v. *Read* (1863) 32 L. J. M. C. 226.

(*t*) *Richards* v. *Bassett* (1830) 10 B. & C. 657.

them claiming the dollars as wreck, and tendered in evidence a presentment or survey in the form of answers to articles proposed to the tenants by certain commissioners, in which answers the tenants presented that the lord had a right to such wreck. The document was held inadmissible on the ground that wreck was a private right in which the tenants as such had no interest (*u*). On questions of boundary it appears that presentments are evidence (*x*), though it would seem that on principle they should not be admissible for this purpose except between persons interested in the manor, unless the presentment is accompanied by some open act of claim, as a perambulation (*y*). In two cases in which presentments or surveys were not admitted as evidence of boundary as against strangers to the manor, it appears that the persons holding the survey were not such a body as would have had authority to hold them, and the court seems further to have thought that on the questions there in issue no authority less than statutory powers would have been adequate, in which case the survey might have been admissible as a public document (*z*). Such surveys however, even though made without jurisdiction in the sense above mentioned, may be evidence as admissions when they have been made by the authority of a predecessor in title of the party against whom they are tendered (*a*).

Subject to the conditions aforesaid, any presentment of a manorial court will be admissible as reputation which purports to state the terms of any general customary right prevailing within the manor, as for example a custom for the freeholders to get stone from the waste to be used and spent

(*u*) *Talbot* v. *Lewis* (1834) 1 C. M. & R. 495; 6 C. & P. 603.

(*x*) See case cited in last note.

(*y*) See pp. 60, 227.

(*z*) *Evans* v. *Taylor* (1838) 7 A. & E. 617; *Daniel* v. *Wilkin* (1852) 7 Ex. 429.

(*a*) *Bridgman* v. *Jennings* (1699) 1 Ld. Raym. 734.

on their respective tenements (*b*), or the customary mode of descent of lands therein (*c*), or the nature of a customary toll (*d*); and so will an ancient "custumary" be evidence, though not forming part of the rolls, but kept and handed down together with them as a record of the customs of the manor (*e*). Most examples of presentments however consist of presentments of some particular act, as the seizure of a heriot by the lord on the death of a tenant, the exaction of a fine, or the admission of a tenant who claims lands under a special custom of descent. These presentments of course imply the existence of the custom in pursuance of which they are made, but they do not expressly state it; on the other hand they involve a successful act of claim on the part of the lord or the tenant, as the case may be, and it is on this ground that they have usually, if not invariably, been admitted in evidence as res gestæ or acts of ownership (*f*).

§ 3. Verdicts, Judgments, and Depositions.

It is well settled that whenever evidence of reputation in the ordinary sense is admissible, evidence may likewise be given of previous verdicts or judgments between persons who stand in *pari jure* or in *eodem jure*, that is to say, persons who had the same relative interests as the present parties, and between whom the same public or general right was contested and decided (*g*). Thus in an action of trespass to land, where the defendant asserted and the plaintiff denied the existence of a highway over it, the plaintiff was held entitled

(*b*) *Heath* v. *Deane* [1905] 2 Ch. 86.

(*c*) *Roe* v. *Parker* (1792) 5 T. R. 26.

(*d*) *Beaufort* v. *Smith* (1849) 4 Ex. 450, 470.

(*e*) *Denn* v. *Spray* (1786) 1 T. R. 466; *Portland* v. *Hill* (1866) 2 Eq. 765.

(*f*) See *Damerell* v. *Protheroe* (1847) 10 Q. B. 20; and pp. 60—62 above.

(*g*) *Pim* v. *Curell* (1840) 6 M. & W. 234, 266; *Briscoe* v. *Lomax* (1838) 8 A. & E. 198, 214; *Freeman* v. *Phillips* (1816) 4 M. & S. 486.

to give in evidence the record of a previous action brought by himself against a person unconnected with the defendant in which precisely the same issue had been raised in regard to the same particular place and the jury had decided in the plaintiff's favour (*h*). The right claimed by the defendants to both actions was the same public right. They both therefore stood in the same relation to the plaintiff. And the same would have been the case had the plaintiff in the second action been successor in title of the plaintiff in the first. And the rule includes not only verdicts, judgments, and decrees (*i*), but also ancient depositions where the evidence has been recorded in that form (*k*).

This head of evidence is closely analogous to reputation, and has been sometimes spoken of as a kind of reputation (*l*). This view however is open to the objection that it must often happen that the jury, when drawn from the county at large, are not necessarily interested in the matter, and that whenever the verdict has been preceded by a contest as to the public or general right, its admission would offend against the rule that reputation to be admissible must be *ante litem motam* (*m*). The sounder view appears to be that such adjudications on particular cases are analogous to the presentments of particular acts in customary courts (*n*), and are to be regarded rather as res gestæ or acts of ownership than as

(*h*) *Read* v. *Jackson* (1801) 1 East, 355; cp. *Fowler* v. *Port* (1837) 7 C. & P. 792.

(*i*) *Layborn* v. *Crisp* (1838) 4 M. & W. 320.

(*k*) *Freeman* v. *Phillips* (1816) 4 M. & S. 486; *Crease* v. *Barrett* (1835) 1 C. M. & R. 919, as explained in *Evans* v. *Taylor* (1838) 7 A. & E. 617, 626; *Pim* v. *Curell* (1840) 6 M. & W. 234.

(*l*) *Fowler* v. *Port* (1837) 7 C. & P. 792, 794; *Layborn* v. *Crisp* (1838) 4 M. & W. 320, 326; *Briscoe* v. *Lomax* (1838) 8 A. & E. 198, 213; *Pim* v. *Curell*, *supra*. And cf. p. 100 above.

(*m*) *Briscoe* v. *Lomax*, 8 A. & E. at p. 212; *Freeman* v. *Phillips* (1816) 4 M. & S. 486; *Evans* v. *Rees* (1839) 10 A. & E. 151, 156; *R.* v. *Brightside Bierlow* (1849) 13 Q. B. 933, 943.

(*n*) See p. 232.

reputation. This is the view that has found most favour with the courts (*o*), and it seems to receive some support from a recent case in which it was held that old depositions are not admissible under this head of evidence if they contain testimony only as to particular facts (*p*).

It follows from the above statement that awards are not admissible as reputation, for besides being made *post litem motam* they have ordinarily no claim in any sense to be public or general in their character (*q*).

(*o*) *R.* v. *Brightside Bierlow* (1849) 13 Q. B. 933; and *Neill* v. *Devonshire* (1882) 8 App. Ca. 135, 147.

(*p*) *Mercer* v. *Denne* [1904] 2 Ch. 534; [1905] 2 Ch. 538.

(*q*) *R.* v. *Cotton* (1813) 3 Camp. 444; *Rogers* v. *Wood* (1831) 2 B. & Ad. 245; *Evans* v. *Rees* (1839) 10 A. & E. 151.

CHAPTER XI.

PUBLIC DOCUMENTS.

The term Public as applied to documents is used in two distinct senses. It may mean that the statements contained in the document to which it is applied are admissible as a form of testimony, either against all the world or against some class of persons, of the facts stated therein; or it may mean that the document is one of those the originals of which are kept in some special custody for the benefit of the public or of some particular class of persons, and are therefore not ordinarily produced in court, like a private document, but proved by means of some kind of copy. When we speak of a public document in the first sense we are regarding it as a medium of proof; when in the second, as a document for which on public grounds a special mode of adduction is provided. There are many documents which are public in both these senses; there are many others which are only public in the latter sense. A will, for instance, is a public document for the purpose of adduction, the proper mode of proving it in court being the production of the probate merely; but it is not a public document in the other sense, and any recitals of fact contained in the will which forms part of it are no more admissible to prove those facts against strangers than are the recitals contained in any deed of assignment which must be proved by the direct oral evidence of witnesses. On the other hand a register of births, which is

equally a public document for the purpose of adduction (the entries in it being provable by certified copies) is also a public document in the other sense, being admissible as a medium of proof against all persons of the births recorded in it. This chapter is concerned only with the effect of public documents so far as they are admissible as media of proof of the facts stated or recited in them, without regard to the mode of their adduction, which is dealt with in the next Part (*a*).

Such public documents are in principle but a kind of hearsay evidence, like the other exceptional forms of testimony already referred to, though this may be sometimes lost sight of by reason of the official form of the entries contained in them, and from the fact that in the case of many of them it is not necessary to verify the official copies by which they may be proved but merely to produce them in court. The very gist of such documents however is that they contain a statement of some matter of fact by a person duly authorized to make it, who is not, save in very exceptional cases, called as a witness. And the guarantee of their credibility consists in the public duty of the official who keeps them to ascertain the truth of the matters to be recorded, and to make accurate entries of them in the public interest for the purpose of reference.

It follows of course that it is no objection to the admissibility of a public document that the official who is responsible for it obtained his information from other persons and not from his own personal observation of the facts, so long as he appears to have satisfied himself of the truth in pursuance of his public duty (*b*).

Nor is a public document inadmissible on behalf of the very person who made it. In an action of *quare impedit* by the Irish Society against the Bishop of Derry for the recovery of a certain advowson, one question in the case was whether

(*a*) See p. 407.

(*b*) *Doe* v. *Andrews* (1830) 15 Q. B. 756, 759.

the defendant was entitled to give in evidence certain returns made by former Bishops of Derry in obedience to writs issued to them from the Court of Exchequer to ascertain the value of the first fruits and twentieths, which returns contained entries showing the possession and value of the advowson. Parke B. in delivering the opinion of the judges said:—

> We think the entry was properly received. The writs related to a public matter, the revenue of the Crown, and the Bishops, in making the return, discharged a public duty, and faith is given that they would perform their duty correctly; the return is therefore admissible, on the same principle on which other public documents are received.
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> * * * * * * * *
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> In public documents, made for the information of the Crown, or all the King's subjects who may require the information they contain, the entry by a public officer is presumed to be true when it is made, and is for that reason receivable in all cases, whether the officer or his successor may be concerned in such cases or not. A marriage or burial register would certainly be admissible to prove a marriage or death in suits to which the clergyman who made it might happen afterwards to be a party, though he had a pecuniary interest in the particular marriage or death at the time. The observation that it might have been fabricated to advance the interests of the officer, affects the value of the evidence, not its admissibility; and may be offered with more or less effect, according to the degree of interest in the officer, and the proximity of time between the entry and the suit, and other circumstances (*c*).

A document therefore not made in pursuance of a public duty, however solemnly and carefully prepared, will not be admissible as a public document. In the case of *Daniel* v. *Wilkin* decided in 1852 (*d*) the question was whether a certain farm was or was not parcel of some escheat lands forming part of the lordship of Denbigh. For the purpose of proving that it was, the defendants tendered in evidence a survey (that is, the presentment of a jury of survey) made in 1569 by authority of the Earl of Leicester as to lands in the

(*c*) *Irish Society* v. *The Bishop of Derry* (1845) 12 Cl. & F. 641, 647, 668, 669; cf. *Sturla* v. *Freccia* (1880) 5 A. C. at 643.

(*d*) 7 Ex. 429.

lordship of Denbigh which was then in his hands, having been granted to him two years previously by Queen Elizabeth. The evidence was rejected by Baron Parke, who said :—

> The ground on which a survey made by officers of the Crown under a commission is received is that it is presumed that they acted in accordance with their public duty and have stated nothing in their inquisition or survey which is contrary to the fact. But no such presumption of truth attaches to a survey belonging to a private individual, although the presentment of a jury might be evidence of reputation (*e*).

This principle is well exemplified in a recent case of *Mercer* v. *Denne* (*f*) in which one of the issues was as to the existence of an immemorial custom for fishermen, inhabitants of the parish of Walmer, to dry their nets on certain private lands situate near the sea in the said parish. The defendants in order to defeat the claim sought to prove that the high-water mark was formerly above the *locus in quo*, rendering it incapable of the user alleged. In support of this allegation they tendered in evidence a survey of Walmer Castle taken in the year 1616 by the direction of the then Lord Warden of the Cinque Ports, and an estimate made by the King's engineer for the reparation of Walmer and other castles. These documents were produced from the Record Office and they stated that serious damage had been done by the sea to a wall of Walmer Castle. It was held that these documents were not admissible in evidence as public documents, on the ground that they were not shown to be made for public use or for the purpose of affecting Crown property, revenues or grants. On like grounds the court rejected maps and plans prepared by the direction of the Ordnance Board in the years 1641, 1644 and 1647; and also a map or chart published in 1837, which though coming from the custody of the Admiralty,

(*e*) 7 Ex. at p. 437.
(*f*) (1904) 2 Ch. 534; (1905) 2 Ch. 538.

was not an Admiralty chart, not being made by their orders or for public use or by a competent authority.

Public documents which are available as media of proof of the facts stated in them consist for the most part of solemn records of facts made after due inquiry and verification by some officer or person invested with due authority by the Sovereign or by virtue of the common law or in pursuance of some act of parliament in that behalf.

Amongst such public documents are included many ancient documents, as Doomsday Book (*g*), inquisitions post mortem (*h*), surveys and extents of Crown lands and of lands in the Duchies of Cornwall and Lancaster and elsewhere (*i*), maps attached to inclosure awards, returns to inquisitions held by commissioners of sewers (*k*), heralds' visitation books made under Royal authority (*l*), ecclesiastical terriers or returns made under the authority of the 87th canon as to the temporal possessions of the Church (*m*), official books kept by the bishops and their officers (*n*); and many other records with which the modern world is little familiar.

By the common law a public act of parliament is *primâ facie* evidence against everyone of the facts recited in its preamble (*o*), while a private statute on the other hand is only evidence of the facts stated in it as against those who were parties to it, although for the purpose of adduction it may be declared a public act, of which the courts must take

(*g*) *Rowe* v. *Brenton* (1828) 8 B. & C. 737, 738.

(*h*) *Ibid.* p. 740.

(*i*) *Doe* v. *Roberts* (1844) 13 M. & W. 520; *Smith* v. *Earl Brownlow* (1870) L. R. 9 Eq. 241; *Rowe* v. *Brenton* (1828) 8 B. & C. 737; *Roe* v. *Ireland* (1809) 11 East, 280; *Evans* v. *Merthyr Tydfil U. D. C.* (1899) 1 Ch. 241.

(*k*) *Mayor of New Romney* v. *Commissioners of New Romney* (1892) 1 Q. B. 840.

(*l*) Tay. Ev. § 1769.

(*m*) *Ibid.* § 1772.

(*n*) *Irish Society* v. *Bishop of Derry* (1845) 12 Cl. & F. 641.

(*o*) *R.* v. *Sutton* (1816) 4 M. & S. 532.

notice (*q*). The Gazette, which has long been issued under the authority of the Government, is by the common law *primâ facie* evidence of all acts of state which are published in it, though not of other matters (*r*), and this use of it has been greatly extended by numerous statutes dealing with many different subject-matters, which provide for the proof of public acts and matters by means of the Gazette. In particular it is made the appropriate means for proving proclamations of the Sovereign and orders and regulations of departments and officers of state, as may be seen under several of the titles contained in Appendix A.

The rolls of manorial courts are public documents only within certain limits, that is to say, they are evidence of the facts which are duly recorded in them only for and against all persons interested in the manor (*s*); and their custody, being for the benefit of those persons alone, is not public in the same sense as that of the others. Corporation books at common law are public documents in the same limited sense (*t*). And the same limitation, though not expressed, would probably be held to be implied in the case of the minute-books of ordinary incorporated trading companies which are made by statute *primâ facie* evidence of the facts stated in them (*u*), and in other like cases.

It would be inconsistent with the scope of this work to deal in detail with the vast number of public documents which come under the notice of the courts. There are however two classes of such documents which from their importance call for special notice, namely, registers of births, baptisms, marriages, deaths and burials; and bankers' books.

(*q*) *Brett* v. *Beales* (1829) M. & M. 416, 421; *Ballard* v. *Way* (1836) 1 M. & W. 520, 529. But see p. 228. Cp. pp. 21, 460.

(*r*) *R.* v. *Holt* (1793) 5 T. R. 436; *R.* v. *Gardner* (1810) 2 Camp. 513.

(*s*) *Sturla* v. *Freccia* (1880) 5 App. Ca. at p. 643.

(*t*) *Ibid.*

(*u*) See pp. 432, 434.

By the 70th canon, promulgated in 1603 (*x*) ministers of the Church of England were bidden to keep a register of christenings, weddings and burials, a copy of which was to be transmitted annually by the churchwardens to the bishop of the diocese to be preserved in his registry; and the parochial and diocesan registers thus kept are admitted in evidence at common law as public documents (*y*). The same principle was followed in the Act of 1836 for registering births deaths and marriages, which expressly provided that certified copies of the entries in the registers should be receivable as evidence of the birth, death or marriage to which the same related (*z*). This Act dealt only with births deaths and marriages happening in England after the 1st of March, 1837; but for a long time before that date numerous religious communities, outside the pale of the English Church, had been in the habit of keeping similar registers, known to the law as non-parochial registers, for the purpose of keeping like records for the members of their own respective faiths. In the year 1836 Commissioners were appointed to inquire into the state, custody and authenticity of such non-parochial registers and to collect the same; and by the Act of 3 & 4 Vict. c. 92 it was provided that the Registrar-General of Births, Deaths and Marriages in England should receive the same and deposit them in the General Register Office, and that all registers so deposited (except the registers and records of baptisms and marriages at the Fleet and King's Bench Prisons, and certain others) should be receiv-

(*x*) For the terms of this, see Blunt's Book of Church Law, revised by Sir Walter G. F. Phillimore and G. Edwardes Jones: 7th ed. 1894, App. I. "The registration of baptisms is a custom which is probably not to be traced higher than the 15th century, though that of deaths, and perhaps of burials, is of a much more ancient date": *ibid.* p. 65.

(*y*) See pp. 426, 428, 454. The 70th canon was supplemented by the Act of 52 Geo. 3 c. 146 there referred to.

(*z*) 6 & 7 Will. 4 c. 86 ss. 35, 37, 38. See below, pp. 428, 440, 454.

able in evidence in all courts of justice (*a*). The registers which were lodged in the General Register Office in pursuance of these provisions comprised more than 7000 books, extending from the middle of the 16th century to the date of the above Act, and relating variously to births, baptisms, marriages, deaths and burials. A further Act was afterwards passed, under which a number of other non-parochial registers were deposited with the Registrar-General subject to the same provisions (*b*). A full account of these registers will be found in the Commissioners' Reports made in 1838 and 1857.

By the common law credit is given not only to English public documents, but also to those of Scotland, Ireland, British colonies and possessions, and foreign countries, provided always that it appears that they have been kept under the sanction of public authority and are recognised by the tribunals of the country where they are kept as authentic records (*c*). On this principle the official registers kept in India under the authority of the East India Company, and the duplicates thereof transmitted to the secretary's office in London to be kept among their archives there, were held to be public documents and good evidence of the marriages and baptisms recorded in them (*d*). In the case of *The Earldom of Perth* (*e*), the claimant, in order to prove the pedigree and state of his family during the period of their residence in France, tendered attested copies of extracts from

(*a*) As to the mode of adduction, it was enacted that certified copies of the entries in such registers should be admissible, except in criminal cases, in which the original registers alone must be produced; but that in every case previous notice in writing must be given to the opposite party of the intention to use them. See sects. 6, 9, 11—14.

(*b*) 21 Vict. c. 25.

(*c*) *Lyell* v. *Kennedy* (1889) 14 A. C. 437, 448, 449.

(*d*) *Ratcliff* v. *Ratcliff and Anderson* (1859) 7 W. R. 726 (marriage); *Queen's Proctor* v. *Fry* (1879) 4 P. D. 230 (baptism); *Regan* v. *Regan* (1892) 67 L. T. 720 (marriage).

(*e*) *Earldom of Perth* (1848) 2 H. L. C. pp. 865, 873, 874; cf. pp. 876, 877.

the registers of marriages, births, and deaths kept in the Hotel de Ville at St. Germains and other places in France; and evidence having been given that the registers were kept in official places and under the care of official persons and would be receivable in evidence in France as the proper medium of proof of the facts stated in them, they were admitted in evidence after due verification. So on a petition in 1860 for the dissolution of a marriage celebrated at Santiago in Chili in 1838 similar evidence was admitted:—

The Judge Ordinary: If you could prove that the law of Chili required every person who celebrates a marriage to make an entry of it at the time, and you produced the book containing an entry of the marriage, and showed that it was made by the proper officer in pursuance of the duty cast upon him by the law, his record of the marriage would be admissible without calling for evidence that it actually took place.

Keating J.: In *Biddulph* v. *Lord Camoys* (*f*) it was necessary to prove a marriage in France which was celebrated before the Revolution. It was proved by French advocates that registers of marriage were kept at Lisle by official authority, and that those registers were authentic documents both before and since the Revolution, and copies of the documents were admitted in evidence (*g*).

The same principle has been followed by the legislature. Extracts from the register books of births, deaths and marriages in Scotland (*h*), and from the register books of births and deaths in Ireland (*i*), are expressly made admissible in all parts of the King's dominions; and the entries in the registers kept in Ireland of marriages celebrated according to the rites of the United Church of England and Ireland (now dissolved) and those of Presbyterians, Quakers or Jews, as well as the entries of civil marriages before a registrar, are declared to be receivable as evidence of the marriage (*k*).

(*f*) Not reported.

(*g*) *Abbott* v. *Abbott and Godoy* (1860) 29 L. J. P. M. & A. 57, 58; cf. *Queen's Proctor* v. *Fry* (1879) 4 P. D. 230.

(*h*) 17 & 18 Vict. c. 80 s. 58.

(*i*) 26 Vict. c. 11 s. 5.

(*k*) 7 & 8 Vict. c. 81 s. 71; cf. 26 Vict. c. 27; 33 & 34 Vict. c. 110; 36 Vict. c. 16.

By 55 & 56 Vict. c. 23 relating to marriages in foreign parts before British ambassadors, consuls, and other officials, and to marriages on board His Majesty's ships in foreign stations, provision has been made for the transmission to the Registrar-General in England of certificates of all marriages celebrated under its provisions and of duplicate marriage register books, all such certificates and books to be kept in the General Register Office, subject to provisions like those as to the custody and copies of the English register, and to be evidence in like manner of the marriages recorded by them. Similar provisions have also been made for the recording of births and deaths which take place on board British merchant ships (*l*), on His Majesty's ships at sea (*m*), and on foreign passenger ships plying to or from ports in the United Kingdom (*n*) while the same are at sea. By the Marriage Act, 1898 (*o*), provision is made for the celebration of marriages in certain cases before an "authorised person" in lieu of the registrar, and the duty is cast on him of duly recording the marriage and keeping and transmitting the register books.

The Bankers' Books Evidence Act, 1879 (*p*) was passed partly to protect bankers from the inconvenience of producing their books in court (*q*), and partly to facilitate, for the benefit of litigants, the proof of banking transactions (*r*).

(*l*) 57 & 58 Vict. c. 60 s. 254. As to marriages, see sect. 240 (6).

(*m*) 37 & 38 Vict. c. 88 s. 37 (6).

(*n*) 57 & 58 Vict. c. 60 ss. 254, 339.

(*o*) 61 & 62 Vict. c. 58.

(*p*) 42 & 43 Vict. c. 11. By sect. 11 of 45 & 46 Vict. c. 72, the terms "bank" and "bankers" in the earlier Act are declared to include any banking company to which the Companies Acts are applicable. The Act applies to books which are in the custody or control of successors to the bank by whom the entries in the books were originally made. By both Acts and also by 56 & 57 Vict. c. 69 s. 6, certain facts touching the constitution of the bank are made provable by certain returns and certificates. See *Asylum for Idiots* v. *Handysides* (1906) 22 T. L. R. 573.

(*q*) See sects. 3—6.

(*r*) See sect. 7; *Arnott* v. *Hayes* (1887) 36 Ch. D. 731; *Kissam* v. *Link* [1896] 1 Q. B. 574; *Pollock* v. *Garle* [1898] 1 Ch. 1.

Sects. 6 and 7 are as follows :—

6. A banker or officer of a bank shall not in any legal proceedings to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act (*s*), or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of a judge made for special cause.

7. On the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank 3 clear days before the same is to be obeyed, unless the court or judge otherwise directs.

Under sect. 7 a party may obtain (i) copies of the entries in his own banking account for the purpose of putting them in evidence on his own behalf (*t*). Subject to what is said below he may also obtain (ii) copies of the entries in the opposite party's banking account or (iii) copies of entries in an account which though nominally that of a third party can be shown to be virtually (by reason of agency, trust, assignment, or otherwise) the account of his opponent (*u*). Although the terms of sect. 7 are wide enough to cover (iv) the case of the accounts of a third party independent of either of the litigants, it is doubtful how far it was intended to give the court jurisdiction in such case ; and such a power would not be exercised save in most exceptional circumstances (*x*).

It makes no difference to the banker whether he volun-

(*s*) Sect. 4 enacts that a banker's book shall not be received in evidence under the Act unless it is first proved that the book was at the time of the making of the entry one of the ordinary books of the bank and that the entry was made in the usual course of business and that the book is in the custody or control of the bank.

(*t*) *Harding* v. *Williams* (1880) 14 Ch. D. 197.

(*u*) *Re Marshfield* (1886) 32 Ch. D. 499 ; *Howard* v. *Beall* (1889) 23 Q. B. D. 1 ; *South Staffordshire Tramways Co.* v. *Ebbsmith* [1895] 2 Q. B. 669 ; *Pollock* v. *Garle* [1898] 1 Ch. 1, 5.

(*x*) See cases last cited, especially *Pollock* v. *Garle*.

tarily permits the inspection at the instance of his own customer who desires to put the entries in evidence, or is compelled to supply them under an order at the instance of his customer's opponent, or is obliged to produce them to the court under *subpœna duces tecum* when, the account being that of an independent third party, the court has declined to make an order under sect. 7: in each of these cases he is equally entitled to the protection of the Act, and the evidence may be produced to the court in the manner provided by sects. 3 to 6 (*x*), unless the judge otherwise orders (*y*).

The Act does not define the exact scope or time of the inspection allowed under sect. 7. But the courts have expressed the opinion that a party is entitled (as in the case of discovery under Order XXXI r. 12) to inspect not all entries relating to any matter in issue, but only such as he could himself adduce in evidence in chief in support of his own case if he were to call the officers of the bank with their books to prove them; and he must moreover clearly make out that the circumstances are such as to entitle him to inspection for this purpose (*z*).

As the main object, at any rate, of sect. 7 is to enable the applicant to procure relevant evidence which he can adduce at the trial, the court has a discretionary power as to making an order for inspection and copying before the trial; but where the party applying cannot otherwise ascertain what entries are relevant and obtain copies of them, the order will ordinarily be made (*a*).

(*x*) As to the mode of proof, see p. 424.

(*y*) See *Pollock* v. *Garle* [1898] 1 Ch. 1; and cf. *Emmott* v. *Star Newspaper Co.* (1892) 62 L. J. Q. B. 77; *Parnell* v. *Wood* [1892] P. 137.

(*z*) See *Arnott* v. *Hayes* (1887) 36 Ch. D. 731, 735, 737; *South Staffordshire Tramways Co.* v. *Ebbsmith* [1895] 2 Q. B. 669; and *Fitzpatrick* v. *McDonald* (1892) 30 L. R. Ir. p. 249. See pp. 295, 296 below.

(*a*) *Parnell* v. *Wood* [1892] P. 137; *Perry* v. *Phosphor Bronze Co.* (1895) 71 L. T. 854.

It follows from the above that the proper practice is for the applicant to state on affidavit the grounds of his application (although the court has power to make the order without this) to show that it is not of a fishing character, but that the entries are relevant and inspection and copies necessary (*b*). It is also generally better, at any rate in civil proceedings, to give notice of the application to the opposite party or to the third party (as the case may be), although the court has power to make the order *ex parte* (*c*). If however such party swears that the entries applied for are irrelevant, his affidavit protects them from inspection before trial (*d*).

A judge of the court where the action is proceeding may make the order with reference to bankers in any of the other portions of the United Kingdom (*e*).

The mode in which the entries are proved is set out at a later page (*f*).

In Appendix A (*g*) will be found set out the Public Documents most commonly required in practice, tabulated in such a manner as to exhibit their legal source or authority, their effect in evidence as Media of Proof, and their Mode of Adduction.

(*b*) *Davies* v. *White* (1884) 53 L. J. Q. B. 275; *Arnott* v. *Hayes* (1887) 36 Ch. D. 731; *South Staffordshire Tramways Co.* v. *Ebbsmith* [1895] 2 Q. B. 669.

(*c*) *Davies* v. *White* (1884) 53 L. J. Q. B. 275; *Arnott* v. *Hayes* (1887) 36 Ch. D. 731.

(*d*) *Parnell* v. *Wood* [1892] P. 137; *South Staffordshire Tramways Co.* v. *Ebbsmith* [1895] 2 Q. B. 669; *Pollock* v. *Garle* [1898] 1 Ch. 1.

(*e*) *Kissam* v. *Link* [1896] 1 Q. B. 574.

(*f*) See p. 424.

(*g*) See p. 422 *seq.*

CHAPTER XII.

EVIDENCE TAKEN BEFORE TRIAL.

§ 1. *Depositions in Civil Cases.*
(i) *Evidence in former Proceedings.*
(ii) *Depositions before an Examiner or Commissioner.*
(iii) *Perpetuation of Testimony.*
§ 2. *Depositions in Criminal Cases.*
(i) *Under the Indictable Offences Act*, 1848, *and other Acts.*
(ii) *Perpetuation of Testimony under the Criminal Law Amendment Act*, 1867.
(iii) *Depositions under the Prevention of Cruelty to Children Act*, 1894.
(iv) *Depositions under the Coroners Act*, 1887.
(v) *Deposition of the Defendant.*

The preceding chapters of this Part have been devoted to describing the various media of proof which may be adduced in court at the trial of a civil or criminal cause. But in some cases it is permissible to present to the court evidence which either happens to have been already taken in some previous proceedings between the parties or their predecessors, or which has been taken at some previous stage of the same proceeding for the express purpose of being put on record and preserved, in case the witnesses should be unable to attend at the trial. The several kinds of depositions thus admissible form the subject of this chapter.

§ 1. Depositions in Civil Cases.

(i) *Evidence in former Proceedings.*—Where there have been former civil proceedings between the same parties who are now at issue and raising the same questions, and the

witnesses who then gave evidence are now unable to appear, it is admissible in certain prescribed cases to prove in the present proceedings the terms of such previous evidence so far as it relates to the issues which are common to both actions (*a*).

It is immaterial that in the previous proceedings some other person was a party; but if in the present proceedings some person is a party who was not a party to the previous proceedings, the evidence taken in the former case will not be allowed to be used against him (*b*).

The rule embraces cases where the former proceedings were between predecessors in title on one or both sides of the parties to the present suit. Thus where a suit was brought in 1815 by some of the customary tenants of a manor on behalf of themselves and all other customary tenants against the lord to establish their right to work minerals under the manor without his consent, and subsequently in 1871 a bill of the same nature was filed against the successor in title of the former lord by some of the customary tenants who did not derive title under any of the persons named as plaintiffs in the former action, it was held that the evidence given in the former suit by witnesses who had since died was admissible in the latter one, the parties on each side in the later suit being held to be privies in estate to the parties in the earlier one (*c*).

And the rule has also been extended to cover cases where the interests of the parties in the second action were represented in the earlier one, to which they were not parties, as, for instance, in the case of legatees or tenants in common (*d*).

(*a*) *Strutt* v. *Bovingdon* (1803) 5 Esp. 56; *Wright* v. *Doe* (1834) 1 A. & E. 3; *Doe* v. *Derby*, *ibid.* 783; cp. *Doncaster* v. *Day* (1810) 3 Taunt. 262.

(*b*) *Wright* v. *Doe*, *supra*; *Brown* v. *White* (1876) 24 W. R. 456.

(*c*) *Llanover* v. *Homfray* (1881) 19 Ch. D. 224; cp. *Doncaster* v. *Day* (1810) 3 Taunt. 262. Cf. *Evans* v. *Merthyr Tydfil U. D. C.* [1899] 1 Ch. 241.

(*d*) *Printing Telegraph and Construction Co. of the Agence Havas, Ltd.* v. *Drucker* [1894] 2 Q. B. 801, at p. 803.

The rule applies *à fortiori* to evidence given on previous proceedings in the same case, as for instance where there is a second trial, either in consequence of a disagreement of the jury, or after the verdict has been set aside and a new trial ordered.

It seems that such former evidence is admissible if the witness is for any cause not producible, as for instance in case of his death, insanity, secretion by the opposite party, illness, disappearance, or absence from the jurisdiction (*e*), although a narrower view has been expressed, according to which it would be admissible in the first three alone of the special events above mentioned (*f*).

Such previous testimony, if taken orally in court in the ordinary way, must be proved by some person who heard it, and can speak to it either from recollection alone or by refreshing his memory from the notes he took of it. It has also been said that it may be proved by means of the judge's notes (*g*), but this would seem to require the consent of both the parties and the judge (*h*).

In the Court of Chancery it was necessary to obtain an order to read evidence taken in former proceedings (*i*). But now by Rule 3 of Order XXXVII it is provided that—

> An order to read evidence taken in another cause or matter shall not be necessary, but such evidence may, saving all just exceptions, be read on *ex parte* applications by leave of the court or a judge, to be obtained at the time of making any such application, and in any other case upon the party desiring to use such evidence giving two days' previous notice to the other parties of his intention to read such evidence.

(*e*) *Llanover* v. *Homfray* (1881) 19 Ch. D. 224, 230; *Strutt* v. *Bovingdon* (1803) 5 Esp. 56; *Fry* v. *Wood* (1737) 1 Atk. 445; Godbolt, Ca. 418; (1623) p. 326; B. N. P. 239.

(*f*) *R.* v. *Scaife* (1851) 17 Q. B. 230, 248; *R.* v. *Marshall* (1841) C. & M. 147. But these were criminal cases; see below, p. 256.

(*g*) *Doncaster* v. *Day* (1810) 3 Taunt. 262.

(*h*) *Conradi* v. *Conradi*, L. R. 1 P. & D. 515, 520.

(*i*) Cons. Ord. (Order XIX r. 4); see Morgan's Ch. Acts and Orders, 3rd ed. 1862.

This rule renders such an order no longer necessary, but it does not in any other way extend the cases in which such former testimony may be adduced, as set out above (*k*).

In regard to civil actions Rule 25 of Order XXXVII provides that—

> All evidence taken on the hearing or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter (*l*).

This rule re-enacts the effect of Rule 15 of the Order of Court of February 1861. It is wide enough to include evidence taken by oral examination at the hearing, and in the Court of Chancery the evidence could be so taken by special order, although the ordinary mode of taking it was by affidavit or by *ex parte* examination before an examiner (*m*).

(ii) *Depositions before an Examiner or Commissioner.*—In civil causes or matters, whenever it seems probable that any intended witness will from any cause be unable to attend and give evidence at the trial, the court has power to make an order at the instance of the party who desires that the evidence may be recorded, that the witness's examination shall be taken beforehand. Order XXXVII deals with such examinations.

> Rule 5. The court or a judge may in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the court or judge or any officer of the court or any other person and at any place of any witness or person, and may empower any party to any such cause or matter to give such depositions in evidence therein on such terms, if any, as the court or a judge may direct (*n*).
>
> Rule 6A. If in any case the court or a judge shall so order, there shall be issued a request to examine witnesses in lieu of a commission. . . .

(*k*) *Printing Telegraph and Construction Company of the Agence Havas, Ltd.* v. *Drucker* [1894] 2 Q. B. 801.

(*l*) The corresponding county court rule is confined to documentary evidence taken at the trial: see C. C. R. 1903, Order XVIII r. 12.

(*m*) See Order of Court, Feb. 1861, r. 4.

(*n*) Cf. also the terms of Rule 1, Chap. XIII, p. 264 below.

Under these rules a Master of the Supreme Court is empowered to order the examination of a witness before either an examiner or a commissioner, or to order the issue of a letter of request addressed to the President or Judge of a Court without the United Kingdom requesting him to order the examination of the witness to be duly held within the jurisdiction of his court.

If the witness is in England the examination is generally ordered to be held before one of the examiners of the Court, more rarely before a special examiner. If in Scotland or Ireland, or in the United States (where letters of request are not acceptable) it is generally held before a commissioner or a special examiner. In India and the Colonies and in foreign countries, other than the United States, the procedure by letter of request is ordinarily used (*o*).

It is beyond the scope of this work to discuss in detail the differences between these three forms of proceeding for obtaining the testimony of witnesses who cannot attend the trial; it is sufficient here to note that they do not involve any differences of principle touching the law of evidence, and that they will be found fully dealt with in books of practice (*p*). The course followed on examinations before an examiner,—the procedure most often resorted to,—is set forth in Rules 10 to 16 of Order XXXVII, which will be found in Appendix C (*q*). The forms are in Appendix D (*r*).

(*o*) The A B C Guide to Practice, 1907, by F. A. Stringer: "Examination of Witnesses."

(*p*) See especially Evidence on Commission by Hume-Williams and Macklin. As to the jurisdiction of the court to order the examination of witnesses who are out of the United Kingdom but within the King's dominions, see 13 Geo. 3 c. 63 ss. 40—45; 24 Geo. 3 c. 25 ss. 78—81; 26 Geo. 3 c. 57 s. 28; and 1 Will. 4 c. 22 ss. 1, 2, 6 and 7. For the powers of the Court in respect of the procedure which may be followed in examining witnesses either within the King's dominions out of the jurisdiction of the court or under letters of request in a foreign country, see 22 Vict. c. 20; and 48 & 49 Vict. c. 74. And as to compelling the attendance of witnesses, see 6 & 7 Vict. c. 82 ss. 5, 6 and 7.

(*q*) See pp. 474, 475.

(*r*) See pp. 482, 483.

With regard to the conditions on which such depositions may be given in evidence, Rule 18 of the same Order provides that—

> Except where by this order otherwise provided or directed by the court or a judge, no deposition shall be given in evidence at the hearing or trial of the cause or matter without the consent of the party against whom the same may be offered, unless the court or judge is satisfied that the deponent is dead or beyond the jurisdiction of the court, or unable from sickness or other infirmity to attend the hearing or trial, in any of which cases the depositions certified under the hand of the person taking the examination shall be admissible in evidence, saving all just exceptions, without proof of the signature to such certificate.

The rule does not expressly exclude the evidence in the event of the witness having disappeared or being kept away by the party against whom the deposition is tendered; and the terms of the rules cited appear quite wide enough to enable the court to make an order in such case for the deposition to be read.

Any court having jurisdiction in bankruptcy has power by sect. 105 (5) of the Act of 1883 (*s*), to take evidence in any matter by interrogatories, or upon affidavit or by commission abroad, and Rule 68 of the Rules made thereunder provides that an order for a commission or letter of request to examine witnesses, and the writ of commission or request, shall follow the forms for the time being in use in the High Court with such variations as circumstances may require.

The powers and practice of the County Courts with regard to examinations before an examiner will be found in the County Court Rules, 1903, Order XVIII rr. 18—32. They closely resemble those of the Supreme Court, but the jurisdiction of the court is confined to ordering the examination of witnesses at any place in England or Wales, and there is therefore no provision for issuing commissions or letters of request.

(iii) *Perpetuation of Testimony.*—In certain cases where a

(*s*) 46 & 47 Vict. c. 52.

person entitled in some future event to some property or office, desires to provide for the possibility of future contest by putting on record and preserving the evidence of his rights, he is entitled to commence proceedings for this purpose alone, although no litigation has been commenced concerning those rights.

Rules 35 to 38 of Order XXXVII contain provisions for such perpetuation of testimony (*q*).

Rule 35. Any person who would, under the circumstances alleged by him to exist, become entitled upon the happening of any future event to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, may commence an action to perpetuate any testimony which may be material for establishing such right or claim.

Such action is brought against the person whose interest it would be to interfere with such alleged claim or right of the plaintiff, although it cannot be set down for trial (*r*). If however at any future time, when the plaintiff's interest or right has come into possession, he should be compelled to litigate with such person or his successors in title, the evidence so taken in the action for perpetuation of testimony, will, subject to the order of the judge, be admissible (*s*).

§ 2. Depositions in Criminal Cases.

The practice of taking before a justice the depositions of the witnesses against a person charged with crime, before committing him for trial, was instituted by the statutes 1 & 2

(*q*) For Rules 36 to 38 see p. 476 below.

(*r*) Rule 38.

(*s*) Semble, the evidence would be admitted in the same events as those mentioned in the last section of this chapter. For examples of such actions, see *In re Stoer* (1884) 9 P. D. 120; *Bute* v. *James* (1886) 33 Ch. D. 157; *West* v. *Sackville* [1903] 2 Ch. 378; and *The Powlett Peerage* [1903] A. C. 395.

Ph. & M. c. 13 and 2 & 3 Ph. & M. c. 10. Those Acts were repealed by the statute 7 Geo. 4 c. 64, which substituted somewhat further provisions as to the taking of depositions by justices and by coroners. The provisions relating to justices were repealed by the Indictable Offences Act, 1848, 11 & 12 Vict. c. 42, which now regulates the taking of such depositions, and the conditions of their admissibility in evidence; and by a later statute, 30 & 31 Vict. c. 35, additional provision has been made for justices to take and record in certain events testimony of witnesses with regard to indictable offences.

The provisions of the Act of Geo. 3 as to coroners were repealed by the Coroners Act, 1887, 50 & 51 Vict. c. 71, which now regulates the taking of the depositions of witnesses at coroners' inquisitions.

Similar provisions are also contained in the two statutes relating to offences against children hereinafter mentioned.

(i) *Indictable Offences Act, 1848, and other Acts.*—By the Indictable Offences Act, 1848, 11 & 12 Vict. c. 42 s. 17, it is provided that:—

> In all cases where any person shall appear or be brought before any justice or justices of the peace charged with any Indictable Offence, whether committed in England or Wales, or upon high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons or have been apprehended, with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the Statement on Oath or Affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such Depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the Justice or Justices taking the same; and the justice or justices before whom any such witness shall appear to be examined as aforesaid shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do.

And if upon the trial of the person so accused as first aforesaid it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is Dead, or so Ill as not to be able to travel, and if also it be proved that such deposition was taken in the Presence of the person so accused, and that he or his counsel or attorney had a full opportunity of Cross-examining the witness, then, if such deposition purport to be Signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same.

It has been held that this statute has not repealed the common law rule that the depositions are admissible in the event of the witness being prevented by the defendant from attending at the trial (though they were never admissible where he simply could not be found) (*t*); and it would seem that by the same reasoning they would be admissible in the event of the witness's insanity (*u*). The provision as to illness applies to the case of pregnancy, although a natural condition, if it produces a condition of illness incapacitating from travel (*x*); but such old age and nervousness as would make it hazardous to travel to court and give evidence will not render the deposition admissible, if there is no illness (*y*).

The statute does not enact that the depositions so taken shall only be admissible on the trial of an indictment charging precisely the same offence in law as that with regard to which they were taken, and it has been held (in conformity with decisions given before the Act) that they are admissible at the trial provided the charge relates to the same transaction with regard to which they were taken and the defendant has had an opportunity of cross-examining the deponents (*z*).

(*t*) *R.* v. *Scaife* (1851) 17 Q. B. 238; *R.* v. *Austin* (1856) Dears. 612.
(*u*) *R.* v. *Scaife*, see last note; *R.* v. *Marshall* (1840) C. & M. 147.
(*x*) *R.* v. *Wellings* (1878) 3 Q. B. D. 426.
(*y*) *R.* v. *Farrell* (1874) L. R. 2 C. C. R. 116.
(*z*) *R.* v. *Beeston* (1854) 24 L. J. M. C. 5: a charge (1) in the first instance

The provisions of this statute were afterwards extended so as to apply also to any witnesses who may be called by the accused. By the Act of 1867 for the amendment of the Criminal Law (*a*), s. 3, it is enacted that immediately after obeying the directions of sect. 18 of the Indictable Offences Act, 1848 (*b*), the justice shall—

> demand and require of the accused person whether he desires to call any witness, and if the accused person shall in answer to such demand call or desire to call any witness or witnesses, such justice or justices shall in the presence of such accused person take the statement on oath or affirmation, examination and cross-examination, of those who shall be so called as witnesses by such accused person, and who shall know anything relating to the facts and circumstances of the case or anything tending to prove the innocence of such accused person, and shall put the same into writing; and such depositions of such witnesses shall be read over to and signed respectively by the witnesses who shall have been so examined and shall be signed also by the justice or justices taking the same, and transmitted in due course of law with the depositions, and such witnesses, not being witnesses merely to the character of the accused, as shall in the opinion of the justice or justices give evidence in any way material to the case or tending to prove the innocence of the accused person, shall be bound by recognizance to appear and give evidence at the said trial; and afterwards, upon the trial of such accused person, all the laws now in force relating to the depositions of witnesses for the prosecution shall extend and be applicable to the depositions of witnesses hereby directed to be taken.

By sect. 19 of 11 & 12 Vict. c. 42 it is enacted that the room or building in which the justice or justices shall take such examinations and statements shall not be deemed an open court for that purpose; and it has been held that the depositions may be taken out of court, as for instance at a hospital (*c*). The section also gives the justice or justices

of wounding with intent to do grievous bodily harm, and (2) afterwards of murder; *R.* v. *Lee* (1864) 4 F. & F. 63: (1) robbery, (2) murder; *R.* v. *Williams* (1871) 12 Cox, 101: (1) false pretences, (2) forgery.

(*a*) 30 & 31 Vict. c. 35.

(*b*) For this section see below, pp. 306, 307.

(*c*) *R.* v. *Katz* (1900) 17 T. L. R. 67.

power in his or their discretion to order that no person shall have access to or be or remain in such room or building without his or their consent or permission, if it appear to him or them that the ends of justice will be best answered by so doing.

By 13 Geo. 3 c. 63 s. 40 and 22 & 23 Vict. c. 21 s. 16, provision is made, with respect to indictments or informations in the King's Bench Division for offences committed in India, for taking the evidence of witnesses in open court in India and transmitting the depositions to the High Court in England.

And by the Merchant Shipping Act, 1894 (*d*), s. 691 (being one of the group of sections entitled Provisions in case of Offences Abroad), where a witness, whose evidence is required, cannot be found in the United Kingdom, any deposition he may previously have made on oath before any justice or magistrate in British dominions out of the United Kingdom, or before any British consular officer elsewhere, is made admissible in evidence provided that it was made in the presence of the person accused.

(ii) *Perpetuation of Testimony under the Criminal Law Amendment Act*, 1867.—Sect. 6 of 30 & 31 Vict. c. 35, after reciting the effect of the provisions of sect. 17 (*e*) of the Indictable Offences Act, 1848, proceeds thus:—

> And whereas by the 17th section of the Act 11 & 12 Vict. c. 42, it is permitted under certain circumstances to read in evidence on the trial of an accused person the deposition taken in accordance with the provisions of the said Act of a witness who is dead, or so ill as to be unable to travel: And whereas it may happen that a person dangerously ill, and unable to travel, may be able to give material and important information relating to an indictable offence, or to a person accused thereof, and it may not be practicable or permissible to take, in accordance with the provisions of the said Act, the examination on deposition of the person so being ill, so as to make the same available as evidence in the event of his or her death before the trial of the

(*d*) 57 & 58 Vict. c. 60.

(*e*) For this section see pp. 255, 256.

accused person, and it is desirable in the interests of truth and justice that means should be provided for perpetuating such testimony, and for rendering the same available in the event of the death of the person giving the same: therefore, whenever it shall be made to appear to the satisfaction of any justice of the peace that any person dangerously ill, and in the opinion of some registered medical practitioner not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition in accordance with the provisions of the said Act of the person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the same, and shall add thereto by way of caption a statement of his reason for taking the same, and of the day and place when and where the same was taken, and of the names of the persons (if any) present at the taking thereof, and, if the same shall relate to any indictable offence for which any accused person is already committed or bailed to appear for trial, shall transmit the same with the said addition to the proper officer of the court for trial at which such accused person shall have been so committed or bailed, and in all other cases he shall transmit the same to the clerk of the peace of the county, division, city, or borough, in which he shall have taken the same, who is hereby required to preserve the same, and file it of record; and if afterwards, upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be dead, or if it shall be proved that there is no reasonable probability that such person will ever be able to travel or to give evidence, it shall be lawful to read such statement in evidence, either for or against the accused, without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to the satisfaction of the court that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person, or his counsel or attorney, had or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same.

Sect. 7. Whenever a prisoner in actual custody shall have served or shall have received notice of an intention to take such statement as hereinbefore mentioned, the judge or justice of the peace by whom the prisoner was committed, or the visiting justices of the prison in which he is confined, may, by an order in writing, direct the gaoler having the custody of the prisoner to convey him to the place mentioned in the said notice for the purpose of being present at the taking of the

statement; and such gaoler shall convey the prisoner accordingly, and the expenses of such conveyance shall be paid out of the funds applicable to the other expenses of the prison from which the prisoner shall have been conveyed.

It has been held that the notice prescribed by sect. 6 must be express and in writing; otherwise, though the prisoner were present at the examination, the statement will be inadmissible (*e*). The statement provided for by this section differs therefore from the depositions taken under 11 & 12 Vict. c. 42 in the following respects: (a) no proceedings need have been commenced at the time that it is taken; (b) previous notice in writing of the examination must be given to any person against whom it is to be tendered in evidence; (c) it is not essential that such person should have been present at the examination provided the prescribed notice was given; (d) the only events in which the statement is admissible are the death of the deponent and his inability to travel or to give evidence.

For the various provisions of the Fugitive Offenders Act, 1881 (*f*), as to the taking of depositions thereunder, see sect. 29 of that Act.

(iii) *Depositions of Children under the Prevention of Cruelty to Children Act*, 1904 (*g*).—The unsworn evidence of a child upon a charge of defilement under sect. 4 of the Criminal Law Amendment Act, 1885 (*g*), was held not to be admissible as a deposition (*h*). But by the Prevention of Cruelty to Children Act, 1904 (*i*), somewhat special provisions have been made of a similar character to those set forth in the last two sections. These provisions in part coincide with, and in

(*e*) *R.* v. *Shurmer* (1886) 17 Q. B. D. 323.

(*f*) 44 & 45 Vict. c. 69. Cf. *R.* v. *Governor of Brixton Prison* [1907] 1 K. B. 696.

(*g*) 48 & 49 Vict. c. 69. See p. 141 above as to testimony of children under this statute.

(*h*) *R.* v. *Pruntey* (1887) 16 Cox, 344.

(*i*) 4 Edw. 7, c. 15. This Act repealed the Prevention of Cruelty to Children Act, 1894.

part form an addition to, those above referred to. They are as follows:—

Sect. 13.—(1) Where a justice is satisfied by the evidence of a registered medical practitioner that the attendance before a court of any child, in respect of whom an offence of cruelty within the meaning of this Act or any of the offences mentioned in the First Schedule to this Act is alleged to have been committed, would involve serious danger to its life or health, the justice may take in writing the deposition of such child on oath, and shall thereupon subscribe the same and add thereto a statement of his reason for taking the same, and of the day when and place where the same was taken, and of the names of the persons (if any) present at the taking thereof.

(2) The justice taking any such deposition shall transmit the same with his statement—

(a) If the deposition relates to an offence for which any accused person is already committed for trial, to the proper officer of the court for trial at which the accused person has been committed; and

(b) In any other case to the clerk of the peace of the county or borough in which the deposition has been taken; and the clerk of the peace to whom any such deposition is transmitted shall preserve, file, and record the same.

Sect. 14. Where on the trial of any person on indictment for any offence of cruelty within the meaning of this Act or any of the offences mentioned in the First Schedule to this Act, the court is satisfied by the evidence of a registered medical practitioner that the attendance before the court of any child in respect of whom the offence is alleged to have been committed would involve serious danger to its life or health, any deposition of the child taken under the Indictable Offences Act, 1848, or the Petty Sessions (Ireland) Act, 1851, or this Act, shall be admissible in evidence, either for or against the accused person without further proof thereof—

(a) If it purports to be signed by the justice by or before whom it purports to be taken; and

(b) If it is proved that reasonable notice of the intention to take the deposition has been served upon the person against whom it is proposed to use the same as evidence, and that that person or his counsel or solicitor had, or might have had if he had chosen to be present, an opportunity of cross-examining the child making the deposition.

Sect. 15 of the same Act, providing that in proceedings for offences against the Act or against the enactments mentioned

in the first schedule thereto, any child of tender years who does not in the opinion of the court understand the nature of an oath, may give unsworn testimony on certain conditions, has been already referred to at a previous page (*j*).

The offences referred to in the schedule to the Act are the following :—

> Any offence under sects. 27, 55, or 56 of the Offences against the Person Act, 1861, and any offence against a child under the age of 16 years under sects. 5, 42, 43, 52, or 62 of that Act or sect. 11 of the Criminal Law Amendment Act, 1885. Any offence under the Dangerous Performances Act, 1879 and 1897. Any other offence involving bodily injury to a child under the age of 16 years.

It is thus obvious that in many prosecutions under the Criminal Law Amendment Act, 1885, the unsworn depositions of children will now be admissible by virtue of the provisions of this Act.

(iv) *Depositions under the Coroners Act*, 1887.—Sect. 4 of 50 & 51 Vict. c. 71 provides that—

> (1) The coroner and jury shall at the first sitting of the inquest view the body, and the coroner shall examine on oath touching the death all persons who tender their evidence respecting the facts and all persons having knowledge of the facts whom he thinks it expedient to examine.
>
> (2) It shall be the duty of the coroner in a case of murder or manslaughter to put into writing the statement on oath of those who know the facts and circumstances of the case, or so much of such statement as is material, and any such deposition shall be signed by the witness and also by the coroner.

Sect. 5 (3) provides that—

> The coroner shall deliver the inquisition, deposition, and recognizances, with a certificate under his hand that the same have been taken before him, to the proper officer of the court in which the trial is to be, before or at the opening of the court.

This statute, like those which it replaced, contains no provision as to the events in which the depositions taken by the

(*j*) See above, pp. 141, 142.

coroner are admissible on the trial of the offender. But it has been held that these events are the death or insanity of the witness, illness disabling him from travelling, or the fact that he is secreted or kept away by the defendant (*k*).

The question has been raised and never finally settled whether they are admissible if the accused was not present when they were taken (*l*). On principle it would seem that in such case they are inadmissible.

(v) *Deposition of the Defendant.*—Inasmuch as a person charged with an indictable offence may now by virtue of the Criminal Evidence Act, 1898, give evidence on his own behalf before the magistrate (*m*), it follows that if he does so, but does not give evidence at the subsequent trial, the deposition of his testimony may in that case be given in evidence against him (*n*). It would of course be equally admissible as a confession or admission, provided that sect. 17 of the Indictable Offences Act, 1848, had been complied with (*o*), and as such might be proved in any way in which evidence of such an admission may be given.

(*k*) 1 Hale, P. C. 305; *R.* v. *Wilshaw* (1841) C. & M. 145; *R.* v. *Scaife* (1851) 17 Q. B. 238; *R.* v. *Austin* (1856) Dears. 612.

(*l*) See Roscoe's Crim. Ev. 12th ed. p. 67.

(*m*) See p. 130 above.

(*n*) *R.* v. *Bird* (1898) 15 T. L. R. 26.

(*o*) For this section see pp. 306, 307, below.

CHAPTER XIII.

EVIDENCE BY AFFIDAVIT AND UNDER DISCRETIONARY ORDERS.

§ 1. *Evidence by Affidavit.*
§ 2. *Account Books as Evidence.*
§ 3. *Evidence of Particular Facts under Order XXX.*

§ 1. Evidence by Affidavit.

Evidence by affidavit is chiefly used upon summary applications, but it may also in certain events be used at the trial of a civil cause.

The two following rules prescribe generally the conditions of its admissibility at the trial :—

Order XXXVII r. 1.—In the absence of any agreement in writing between the solicitors of all parties, and subject to these rules, the witnesses at the trial of any action or at any assessment of damages shall be examined *viva voce* and in open court, but the court or a judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the court or judge may think reasonable, or that any witness whose attendance in court ought for some sufficient cause to be dispensed with be examined by interrogatories or otherwise before a commissioner or examiner, provided that where it appears to the court or a judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

Rules 25—30 of Order XXXVIII relate to Trial on Affidavit and Rule 28 provides as follows :—

When the evidence is taken by affidavit any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the

opposite party may serve upon the party by whom such affidavit has been filed a notice in writing requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the court or judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the court or a judge. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production.

The following rule relates to the admissibility of evidence by affidavit on interlocutory applications:—

Order XXXVIII r. 1.—Upon any motion, petition, or summons, evidence may be given by affidavit; but the court or a judge may, on the application of either party, order the attendance for cross-examination of the person making such affidavit.

With regard to the admissibility of hearsay evidence in affidavits, Rule 3 of the same Order provides as follows:—

Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall be paid by the party filing the same.

Where an affidavit of information and belief does not state the source of the information or belief it is irregular and therefore inadmissible as evidence (*a*).

It appears from the above that affidavits differ from other forms of testimony, whether given orally or recorded in depositions, in this, that if they are for use on interlocutory motions, hearsay is admissible generally without any of the restrictions discussed in the preceding chapters of this Part, whereas on all other occasions, save where any order to the

(*a*) *Quartz Hill Consolidated Mining Co.* v. *Beall* (1882) 20 Ch. D. 501, 508; *Re J. L. Young Manufacturing Co., Ltd.* [1900] 2 Ch. 753. A party or solicitor relying on such an affidavit does so at his peril as to costs. *Ibid.*

contrary is made under any rule hereinafter mentioned, they must be confined to such facts as a witness can prove of his own knowledge, as explained in Chapter I of this Part.

The procedure relating to the making, filing, and use in evidence of affidavits is contained in Order XXXVIII.

§ 2. Account Books as Evidence.

When it is necessary to the decision of the issues that an account should be taken which cannot conveniently be taken before the judge or jury, it is the practice of the court to delegate the trial of this part of the issues by either directing that the account shall be taken by one of its ordinary officers or referring the matter to an official or special referee (*c*). Order XXXIII contains the following provisions with regard to the giving of directions for the taking of an account and the mode of taking it in pursuance thereof:—

Rule 2. The court or a judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner.

Rule 3. The court or a judge may, either by the judgment or order directing an account to be taken or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched, and in particular may direct that in taking the account, the books of account in which the accounts in question have been kept shall be taken as *primâ facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised (*d*).

There is nothing in these rules to restrict the jurisdiction to make orders thereunder to cases where the persons who

(*c*) See Order XV and Order XXXIII rr. 2—9; Arbitration Act, 1889, 52 & 53 Vict. c. 49, ss. 13, 14 and 15.

(*d*) The provisions of this rule reproduce in substance sect. 54 of the Chancery Procedure Amendment Act, 1852, 15 & 16 Vict. c. 86, which section was repealed in 1883 by 46 & 47 Vict. c. 49.

would ordinarily be called to prove the accounts are dead, nor is it in practice confined to such cases alone. But the power vested in the court to order that books of account shall be taken as *primâ facie* evidence of the truth of the matters stated in them is not generally resorted to for the sake of merely saving expense, when the ordinary means exist for proving the account. But if vouchers have been lost or for any other reason it is impossible to take the accounts in the ordinary manner, the court may make an order under these rules (*f*).

These provisions as to account-books call to mind an act of parliament which is not resorted to in practice, though unrepealed, and which shows that in the beginning of the 17th century a tradesman's shop-books were admitted, in actions for goods sold or work done, as *primâ facie* evidence of the transactions recorded in them. This is the statute 7 Jac. 1 c. 12, which, after reciting that tradesmen made fraudulent entries in their shop-books or left the entries uncancelled after they had been paid, in order to charge their customers unjustly after the particulars had been forgotten, enacted that such shop-books should not be given in evidence by tradesmen in any such action unless it were brought within one year after the accrual of the claim, with a proviso however that the limitation should not apply in actions between the tradesman or merchant and his fellows.

§ 3. Evidence of Particular Facts under Order XXX.

Rule 7 of Order XXX, relating to the Summons for Directions, is in the following terms :—

On the hearing of the summons, the court or a judge may order that evidence of any particular fact, to be specified in the order, shall

(*f*) *Lodge* v. *Prichard* (1853) 3 De G. M. & G. 906; *Ewart* v. *Williams* (1855) 7 De G. M. & G. 68. The practice under these rules will be found in Daniell's Chancery Practice, and Seton on Decrees,

be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries or otherwise as the court or judge may direct.

This rule was framed in pursuance of sect. 3 of the Supreme Court of Judicature Act, 1894 (*g*), and has for its object to enable the court to dispense with the strict rules of evidence, where justice so requires (*h*). It is largely used in actions in the Commercial List in which evidence from abroad is constantly required. In these cases commissions and examinations of witnesses out of the jurisdiction of the court are frequently avoided by an order admitting affidavits, letters, and other documents in evidence.

(*g*) 57 & 58 Vict. c. 16.
(*h*) *Baerlein* v. *Chartered Mercantile Bank* [1895] 2 Ch. 488, 492.

CHAPTER XIV.

PRIVILEGE.

§ 1. *Penal Consequences.*
§ 2. *Legal Professional Privilege.*
§ 3. *Husband and Wife.*
§ 4. *Documents and Affairs of State.*
§ 5. *Title Deeds.*
§ 6. *Privileged Admissions in Civil Cases.*
§ 7. *Privileged Admissions in Criminal Cases.*

The admissibility of the media of proof described in the foregoing chapters of this Part, must be taken subject to certain qualifications. There are some matters as to which the law on public grounds prohibits the giving of any evidence; and with regard to others it confers either on the party or on the witness a right, which he may claim or may waive as he likes, of not disclosing them. These disabilities and privileges may be conveniently grouped together in one chapter; and are here considered under seven distinct heads, of which the first four apply indifferently to parties or witnesses, the fifth to witnesses alone, and the sixth and seventh to parties alone.

§ 1. Penal Consequences.

A person whether party or witness cannot be compelled to give any evidence which would tend to subject him to any

punishment, penalty (*a*), forfeiture, or ecclesiastical censure (*b*). The principle of the common law on which this rests, that no man can be compelled to criminate himself,—expressed in the maxim *Nemo tenetur se ipsum accusare*,—has been already referred to in the chapter on Admissions and Confessions (*c*), but finds its fullest illustration here.

The rule applies equally to the giving of statements in evidence and the production of documents (*c*), and whether the same are sought to be obtained while the person is in the witness-box or by means of interlocutory proceedings, as discovery or interrogation (*d*).

As a general rule a party or witness is not entitled by reason of this privilege to object to any question or interrogatory being addressed to him, since he may, if he think fit, waive the privilege and make answer, and moreover the objection must generally be made on oath (*e*). But this general rule is subject to exceptions in the case of penal actions and actions for forfeitures; in these actions the defendant is not put to objecting on oath to answer interrogatories or discover documents; no order whatever will be made for discovery or interrogation on any issue relating to such penalty or forfeiture (*f*).

(*a*) As to what constitutes penalty, see *Adams* v. *Batley* (1887) 18 Q. B. D. 625; *Saunders* v. *Wiel* [1892] 2 Q. B. 321.

(*b*) *U. S. of America* v. *McRae* (1867) 3 Ch. 79, 83, 87; *Redfern* v. *Redfern* [1891] P. D. 139, 147. For certain apparent qualifications on this general rule, see Bray on Discovery, p. 340. The first of the above cited cases illustrates the application of the principle to the case of a forfeiture arising under foreign law.

(*c*) Above, pp. 150, 151.

(*d*) *Spokes* v. *Grosvenor Hotel Co., Ltd.* [1897] 2 Q. B. 124, and cases cited in Bray on Discovery, p. 314.

(*e*) *Allhusen* v. *Labouchere* (1878) 3 Q. B. D. 654; *Lamb* v. *Munster* (1882) 10 Q. B. D. 110.

(*f*) *Hunnings* v. *Williamson* (1883) 10 Q. B. D. 459; *Martin* v. *Treacher* (1886) 16 Q. B. D. 507; and *Saunders* v. *Wiel* [1892] 2 Q. B. 321 (actions for penalties); *Jones* v. *Jones* (1889) 22 Q. B. D. 425; and *T. W. Hobbs & Co., Ltd.* v. *Hudson* (1890) 25 Q. B. D. 232 (penal actions); *Mexborough* v. *Whitwood U. D. C.* [1897] 2 Q. B. 111 (forfeiture of lease).

In all other cases than these, if there is nothing in the nature of the case to make it evident that circumstances raising the privilege exist, the mere fact that a witness states his belief that his answer will have a criminating effect is not enough to excuse him from answering; the judge must be satisfied from the circumstances of the case and the nature of the evidence which the witness is called on to give that there is reasonable ground to apprehend danger to him from his being compelled to answer; but if it is once made to appear that the witness is in danger, great latitude is allowed to him in judging for himself of the effect of any particular question (*g*).

If on the other hand it is pretty evident from the nature of the proceedings that a case of privilege arises, the mere statement on oath by the person desiring to claim it that he thinks or believes or is advised that his answering may criminate him is sufficient (*h*).

Whenever the forfeiture has been effectually waived, or where lapse of time has become a bar to any criminal or other proceedings being taken (*i*), or the offence has been purged or has been pardoned (*k*), the privilege of course no longer exists.

It was formerly questioned whether a witness was privileged also from answering any question the answer to which would tend to subject him to other civil liabilities, as debt. This was set at rest by the statute 46 Geo. 3 c. 37, which enacts that—

> A witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to penalty or forfeiture of any nature whatsoever by reason only or on the sole ground that the answering of such

(*g*) *R.* v. *Boyes* (1861) 30 L. J. Q. B. 301; *In re Reynolds* (1882) 20 Ch. D. 294.

(*h*) *Lamb* v. *Munster* (1882) 10 Q. B. D. 110.

(*i*) *Roberts* v. *Allatt* (1828) M. & M. 192; *Att.-Gen.* v. *Canard S.S. Co.* (1887) 4 T. L. R. 177.

(*k*) *R.* v. *Boyes* (1861) 30 L. J. Q. B. 301.

question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit, either at the instance of His Majesty or of any other person or persons.

And hence the rule cannot be invoked in an action for liquidated damages (*l*), and the same is true of an action for an order under a statute to prohibit a nuisance, even though disobedience to such order might render the defendant liable to further proceedings in which a penalty might be imposed (*m*).

Modern decisions afford many illustrations of the application of this head of privilege, including *inter alia* cases of apprehended crimination or forfeiture in respect of bigamy (*n*), bribery (*o*), criminal libel (*p*), penalties (*q*), various penal actions (*r*), adultery (*s*), confiscation of a party's property by the law of a foreign state (*t*), and forfeiture of a term of years for breaches of covenant (*u*).

A statement made by the defendant is not the less admissible against him because it has been made on oath in the course of other proceedings (provided he has not objected to answering on the ground that his answers would criminate him), as for instance in evidence given by him as a witness at a coroner's inquest (*x*), as a debtor or witness examined in the

(*l*) *Adams* v. *Batley* (1887) 18 Q. B. D. 625.

(*m*) *Mayor, &c. of Derby* v. *Derbyshire C. C.* [1897] A. C. 550.

(*n*) *Harvey* v. *Lovekin* (1884) 10 P. D. 122.

(*o*) *R.* v. *Boyes* (1861) 30 L. J. Q. B. 301.

(*p*) *Lamb* v. *Munster* (1882) 10 Q. B. D. 110; *Pankhurst* v. *Wighton & Co.* (1886) 2 T. L. R. 745.

(*q*) *Hunnings* v. *Williamson* (1883) 10 Q. B. D. 459; *Martin* v. *Treacher* (1886) 16 Q. B. D. 507; *Saunders* v. *Wiel* [1892] 2 Q. B. 321.

(*r*) *Jones* v. *Jones* (1889) 22 Q. B. D. 425; *T. W. Hobbs & Co., Ltd.* v. *Hudson* (1890) 25 Q. B. D. 232.

(*s*) *Redfern* v. *Redfern* [1891] P. D. 139.

(*t*) *U. S. of America* v. *McRae* (1867) 3 Ch. 79.

(*u*) *Pye* v. *Butterfield* (1864) 34 L. J. Q. B. 17; *Mexborough* v. *Whitwood U. D. C.* [1897] 2 Q. B. 111.

(*x*) *R.* v. *Bateman* (1866) 4 F. & F. 1068; *R.* v. *Chesham*, cited in *R. v. Coote* (1873) L. R. 4 P. C. 599, 606, where the admissibility of admissions made on oath is discussed.

course of bankruptcy proceedings (*y*), as a witness on the prosecution of some other person (*z*), or in the course of a civil suit (*a*), or in a special statutory court for the investigation of fires (*b*).

Where power is given by statute to compel the examination of witnesses the ordinary rule of the common law, which protects a person from answering questions which tend to criminate him, is held to apply unless expressly excluded. An example of this is to be found in the examination of a witness in bankruptcy proceedings in reference to the affairs of the debtor (*c*). And whenever a witness is entitled to raise this objection, but is nevertheless improperly compelled to answer, his answers so given are not admissible in evidence against him in any other proceeding (*d*).

In certain cases however the legislature has thought it right in the public interest to repeal the privilege thus given by the common law, while giving in most cases protection in another form to the person compelled to answer. The following are some of the principal exceptions thus created:—

(i) *Frauds by Agents, Bankers or Factors.*—Sects. 75 to 84 of the Larceny Act, 1861 (*e*), having defined a number of offences under this heading and made them punishable as therein mentioned, sect. 85 enacts that—

> Nothing in any of the last ten preceding sections of this Act contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity or to answer any

(*y*) 46 & 47 Vict. c. 52 ss. 17, 24, 27; *R.* v. *Sloggett* (1856) Dears. C. C. 656; *R.* v. *Scott* (1856) Dears. & B. C. C. 47; *R.* v. *Robinson* (1867) L. R. 1 C. C. R. 80; *R.* v. *Widdop* (1872) L. R. 2 C. C. R. 3.

(*z*) *R.* v. *Haworth* (1829) 4 C. & P. 254; *R.* v. *Chidley* (1860) 8 Cox, 365.

(*a*) *R.* v. *Garbett* (1847) 1 Den. C. C. 236.

(*b*) *R.* v. *Coote* (1873) L. R. 4 P. C. 599.

(*c*) *Ex parte Schofield, In re Firth* (1877) 6 Ch. D. 230; *Ex parte Reynolds, Re Reynolds* (1882) 20 Ch. D. 294 (under the Act of 1869); and *Re Genese, Ex parte Gilbert* (1886) 3 Morr. 223 (under the Act of 1883).

(*d*) *R.* v. *Garbett* (1847) 1 Den. C. C. 236; *R.* v. *Coote* (1873) L. R. 4 P. C. 572, 607.

(*e*) 24 & 25 Vict. c. 96.

question or interrogatory in any civil proceeding in any court or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanours in any of the said sections mentioned by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act on oath in consequence of any compulsory process of any court of law or equity in any action, suit or proceeding which shall have been *bonâ fide* instituted by any party aggrieved.

With regard to these same offences, sect. 27 (2) of the Bankruptcy Act, 1890 (*f*), contains this further enactment:

A statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in any proceeding in respect of any of the misdemeanours referred to in the said section 85.

(ii) *Other Offences than those aforesaid, disclosed in the Debtor's Examination in Bankruptcy.*—With regard to these the common law privilege is removed without any countervailing protection being provided. Sect. 17 (8) of the Bankruptcy Act, 1883 (*g*), enacts as follows:—

The debtor shall be examined upon oath and it shall be his duty to answer all such questions as the court may put or allow to be put to him. Such notes of the examination as the court thinks proper shall be taken down in writing, and shall be read over to and signed by the debtor, and may thereafter be used in evidence against him; they shall also be open to the inspection of any creditor at all reasonable times.

This sub-section therefore removes, for the purpose of the examination thus authorised, the common law privilege of the debtor in respect of questions tending to disclose any offence whatsoever (*h*) (and at the same time provides a statutory mode of proof of the answers of the debtor, which

(*f*) 53 & 54 Vict. c. 71.

(*g*) 46 & 47 Vict. c. 52.

(*h*) *R.* v. *Erdheim* [1896] 2 Q. B. 260, 269; cf. *R.* v. *Scott* (1856) D. & B. 47.

is available in subsequent proceedings), subject only to this, that in respect of proceedings against the debtor for frauds committed by him as agent, banker, or factor, the answers so given in his examination are rendered inadmissible by virtue of the Acts of 1861 and 1890 just cited. In all other cases the official notes are admissible in evidence in subsequent proceedings against the debtor; and if from non-compliance with the statutory formalities such notes of his examination are not admissible, any other common law mode of proving the answers made by him may be resorted to (*i*). The debtor's examination is not however made evidence against any person other than the debtor himself (*k*).

(iii) *Other Enactments.*—Somewhat similar provisions to those mentioned in paragraph (i) above have been made with regard to the discovery of the names of the persons responsible for the publication of a newspaper alleged to contain libellous matter (*l*), as to fraudulent offences in regard to title deeds and wills (*m*), and as to offences against the Corrupt and Illegal Practices Act, 1883 (*n*), the Explosive Substances Act, 1883 (*o*), and the Merchandise Marks Act, 1887 (*p*). Each of these Acts, while repealing in certain cases the common law privilege of refusing to give incriminating evidence, provides, subject to certain conditions, against the answers so given being used in subsequent proceedings against the person who has made them.

(*i*) See cases cited in last note.

(*k*) *In re Brünner* (1857) 19 Q. B. D. 572; cf. *New, Prance & Garrard's Trustee* v. *Hunting* [1897] 2 Q. B. 19.

(*l*) 6 & 7 Will. 4 c. 76 s. 19, as incorporated in Schedule II of 32 & 33 Vict. c. 24.

(*m*) 24 & 25 Vict. c. 96 ss. 28 and 29.

(*n*) 46 & 47 Vict. c. 51 s. 59.

(*o*) 46 Vict. c. 3 s. 6.

(*p*) 50 & 51 Vict. c. 28 s. 19.

§ 2. Legal Professional Privilege.

Every party to legal proceedings, and every witness, is entitled to what is known as legal professional privilege. This privilege protects from disclosure two classes of communications: (i) confidential communications which have passed at any time between the party or witness and his legal adviser in his professional capacity for the purpose of the former obtaining legal advice for the protection of his interests, information procured in pursuance of such communications for the same purpose, and notes and other records of such communications and information made for the same object; (ii) similar communications, information, notes and records, made or procured with a view to litigation, whether commenced or only contemplated, including therefore instructions to counsel or solicitor, cases to advise, reports, evidence, briefs, &c., prepared on the client's behalf (*q*).

The ground of this head of privilege is not any special importance of the legal profession, but the expediency of securing to every man the full protection of the law (*r*). By reason of the complexity and difficulty of our law litigation can only be properly conducted by professional men, and it is absolutely necessary that a man in order to prosecute his rights, or to defend himself from an improper claim, should be able to place unrestricted and unbounded confidence in his legal adviser, and that the communications he so makes to him should not be divulged save with his

(*q*) *Greenhough* v. *Gaskell* (1833) 1 My. & K. 98; as to this case see 4 B. & Ad. 876; 2 M. & W. 100; *Minet* v. *Morgan* (1874) 8 Ch. 361; *Anderson* v. *Bank of British Columbia* (1876) 2 Ch. D. 644; *Wheeler* v. *Le Marchant* (1881) 17 Ch. D. 675; *Southwark, &c. Co.* v. *Quick* (1878) 3 Q. B. D. 315. Legal professional privilege was formerly confined to (a) correspondence between attorney and client containing legal advice or opinions; and (b) correspondence passing after the dispute leading to the litigation had arisen: *O'Shea* v. *Wood* [1891] P. 286, 289.

(*r*) *Greenhough* v. *Gaskell* (1833) 1 My. & K. 98, 103.

consent, for it is his privilege (and not the privilege of the legal adviser) that he should be enabled properly to conduct his litigation (*s*). If this privilege did not exist at all, every one would be thrown upon his own legal resources; and deprived of all professional assistance, a man would not volunteer to consult any skilful person, or would only dare to tell his counsellor half his case (*t*).

No privilege can be thus acquired for any communication which is made for the purpose of committing a criminal or fraudulent act or of aiding a contempt of court, since that can be no part of the client's interests nor within the scope of the professional duties of a legal adviser; were the rule otherwise, the result would be that a man intending to commit treason or murder might safely take legal advice for the purpose of enabling himself to do so with impunity, and the solicitor to whom the application was made would not be at liberty to give information against his client for the purpose of frustrating his criminal purpose (*u*). The privilege moreover does not extend to any other relations than that existing between the client and his solicitor or counsel. There is no privilege by our law for communications made to a patent agent (*x*), or a pursuivant of the Heralds' College (*y*), nor for those made to a medical man, or a priest, or any ordinary business agent (*z*). Nor does it extend to every sort of communication between the client and his legal adviser. The communications, to be protected, must be made confidentially

(*s*) *Anderson* v. *Bank of British Columbia* (1876) 2 Ch. D. 644, 651.

(*t*) *Greenhough* v. *Gaskell* (1833) 1 My. & K. 98, 103.

(*u*) *Russell* v. *Jackson* (1851) 9 Hare, 392; *Follett* v. *Jefferyes* (1850) 1 Sim. N. S. 3, 17; *R.* v. *Cox* (1884) 14 Q. B. D. 153; *Williams* v. *Quebrada Railway, Land and Copper Co.* [1895] 2 Ch. 751; and *Bullivant* v. *A.-G. for Victoria* [1901] A. C. 196; *Ramsbotham* v. *Senior* (1869) 8 Eq. 575; cf. *In re Postlethwaite* (1887) 35 Ch. D. 722.

(*x*) *Mosely* v. *Victoria Co.* (1886) 55 L. T. 482.

(*y*) *Slade* v. *Tucker* (1880) 14 Ch. D. 824.

(*z*) *Wheeler* v. *Le Marchant* (1881) 17 Ch. D. 675; *Slade* v. *Tucker* (1880) 14 Ch. D. 824.

in reliance on the adviser's professional capacity and not merely addressed to him as a neighbour or a friend (*a*). Subject to these limitations, the privilege applies to communications on any matter within the ordinary scope of the legal adviser's business, as for example, communications with a solicitor relating to the conduct of litigation or to rights of property (*b*), such as the sale of estates or the raising of money (*c*); and it does not affect the privilege that the statements confidentially made or obtained are for some subsequent reason never used in fact (*d*).

Neither client nor solicitor need act personally in their communications with each other in order that the privilege may be claimed; it exists equally when they act by means of clerks, interpreters, or other agents (*e*), and it matters not whether the communications or statements are oral or written provided that they fall within the description above given (*f*).

Although it is customary to divide the rule into the two branches indicated in the first paragraph of this section, it will be seen that they both depend on the same principle, the second being in fact only the special application of the first to the case of litigation. When litigation is threatened or commenced, it is usual for each party's solicitor to enter into communication with those who have acted as agents for, or are required to appear as witnesses on behalf of, his client, with a view to obtaining the information necessary for his

(*a*) *McCorquodale* v. *Bell* (1876) 1 C. P. D. 471; *Anderson* v. *Bank of British Columbia* (1876) 2 Ch. D. 644; *Gardner* v. *Irvin* (1878) 4 Ex. D. 49; *Wheeler* v. *Le Marchant* (1881) 17 Ch. D. 675; *O'Shea* v. *Wood* [1891] P. D. 286.

(*b*) *Wheeler* v. *Le Marchant* (1881) 17 Ch. D. 675, 681, 682; cf. *Lowden* v. *Blakey* (1889) 23 Q. B. D. 332, 334; *R.* v. *Bullivant* [1900] 2 Q. B. 163, 168.

(*c*) *Carpmael* v. *Powis* (1845) 1 Phillips, 687, 692; *Turquand* v. *Knight* (1836) 2 M. & W. 98 at p. 100.

(*d*) *Pearce* v. *Foster* (1885) 15 Q. B. D. 114.

(*e*) *Anderson* v. *Bank of British Columbia* (1876) 2 Ch. D. 644; *Wheeler* v. *Le Marchant* (1881) 17 Ch. D. 675.

(*f*) *Pearce* v. *Foster* (1885) 15 Q. B. D. 114; *Greenhough* v. *Gaskell* (1833) 1 My. & K. 98.

protection; and the result is this, that whereas communications between the client and these persons in the ordinary course of business, before any apprehension of litigation, would not be privileged, those which his solicitor has with them after litigation is threatened, and for the purpose of protecting his interests, are entitled to privilege. This distinction is well illustrated by a case in which an action was brought against a railway company by a passenger in respect of personal injuries (*g*). Upon an application by the plaintiff for discovery the court ordered inspection to be given of a report of one of the defendants' inspectors to the general manager as to the accident in respect of which the action was brought, a report of the guard of the train in which the accident happened, and a report of the defendants' locomotive superintendent to the general manager as to the accident,—upon the ground that they were reports or communications made by agents of the company in the ordinary course of their duty for the purpose of conveying to the company information upon the subject and were not opinions obtained confidentially with a view to litigation; and this without reference to whether they were made before or after the commencement of litigation (*h*). The court also allowed inspection of a copy of a letter written by the defendants' general manager to the Secretary of the Board of Trade as to the accident pursuant to 3 & 4 Vict. c. 97 s. 3, a guarantee, dated 7 years before the accident, of materials for locomotive engines, part of which at the time of the accident formed a portion of the engine of the train in which the plaintiff was injured, and so much of the entries in the minute-books of the locomotive stores and

(*g*) *Woolley* v. *North London Rail. Co.* (1869) L. R. 4 C. P. 602.

(*h*) Cf. *English* v. *Tottie* (1875) 1 Q. B. D. 141, where a defendant, sued for breach of warranty of quality of goods sold to the plaintiff, was ordered to disclose correspondence between himself and his own vendor, which had passed after plaintiff's complaint had been made, for the purpose of the defendant's ascertaining whether the complaint was well founded, and obtaining an allowance on the price of the goods.

traffic committee relating to the accident as were not entries of communications between the defendants and their legal advisers, or the result thereof. On the other hand the court refused inspection of reports to the defendants' locomotive superintendent from scientific men consulted by or on behalf of the defendants with reference to the cause of the accident, and a report to the defendants' solicitors from one of the scientific men consulted on behalf of the defendants with reference to the cause of the accident—on the ground that they had been obtained by the defendants' solicitors for the purpose of assisting them in the litigation. In a similar action against a tramway company the plaintiff, after claim made but before action, had voluntarily submitted to be examined by the defendants' medical officer, who sent a report of the examination to the defendants' solicitor. Upon an application against the defendants for discovery, they swore that the report was a communication from their medical adviser to their solicitors, made at the request of the solicitors after receipt of notice of the plaintiff's claim, and that the same was so made in view of litigation then apprehended in respect of such claim and with a view to their defence thereto; and it was held that under these circumstances the report was privileged (*i*). Other instances of privilege are afforded by letters written by a solicitor to possible witnesses in anticipation of litigation (*j*), surveys of a vessel sworn to have been made solely for the purpose of a contemplated litigation (*k*), copies of Board of Trade depositions taken for the same purpose (*l*), and also the transcript of shorthand notes of a private examination taken under sect. 27 of the Bankruptcy Act, 1883, for the purpose of the trustee in bankruptcy being advised by his solicitor as to whether an action should

(*i*) *Pacey* v. *London Tramways Co.* (1876) 2 Ex. D. 440, note (1).
(*j*) *McCorquodale* v. *Bell* (1876) 1 C. P. D. 471.
(*k*) *The Theodor Körner* (1878) 3 P. D. 162.
(*l*) *The Palermo* (1883) 9 P. D. 6.

be brought with reference to the bankrupt's affairs (*m*), and transcript of notes of examination under sect. 115 of the Companies Act, 1862, which has the same object (*n*). Even anonymous letters written to a litigant's solicitor and counsel for the purpose of assisting them in the litigation have also been held to be privileged; but not so anonymous letters sent to the client herself (*o*).

In the statement of the rule at the commencement of this section we have roughly classified the statements privileged as communications, information, and notes or records. With regard to communications between the legal adviser and his client, or between the legal adviser and third persons, it is not generally difficult to determine whether they are privileged or not, that is to say, whether they have come into existence solely for the protection of the client's interest in litigation or otherwise. With regard to notes of evidence or other records made in the interest of the client and for his protection a distinction must be drawn between notes of what has passed openly in the presence of both the client and his opponent or those who represent his opponent, for which ordinarily no privilege can be obtained (*p*), and on the other hand those which constitute a record of confidential communications or information, made by the legal adviser or the client or anyone at his instance, which are ordinarily privileged (*q*). More difficulty however has arisen in determining whether the client is bound to disclose matters of fact the existence of which is independent of the confidential communications, but which have been the subject of those communications. The true test however appears to be this: whether the knowledge of these matters of fact has come into the possession

(*m*) *Learoyd* v. *Halifax Joint Stock Bank* [1893] 1 Ch. 686.
(*n*) *North Australian Territory Co.* v. *Goldsborough* [1893] 2 Ch. 381.
(*o*) *Re Thomas Holloway, Young* v. *Holloway* (1887) 12 P. D. 167.
(*p*) *Ainsworth* v. *Wilding* [1900] 2 Ch. 315.
(*q*) *Greenhough* v. *Gaskell* (1833) 1 My. & K. 98, 102.

of the client or his legal adviser solely under the seal of confidence arising out of the professional employment, or on the other hand independently of it. Where for example the client communicates to his solicitor a deed, with which he has been familiar before litigation was contemplated or advice was sought upon it, the mere fact of the deed being the subject of a confidential communication will not create any privilege with regard to it (*r*). In like manner if the client has obtained information solely through confidential communication with his solicitor as to some physical fact relevant to the case, but afterwards inspects the physical fact for himself, he is liable to disclose upon interrogation that which he knows of his own personal knowledge notwithstanding that it was first brought to his attention by means of the confidential communication (*s*). So a solicitor appearing as a witness is not entitled to withhold the place of residence of a client, if the same be relevant to the issue, merely by swearing that it came to his knowledge in his professional capacity and in the course and in consequence of his professional employment on such client's behalf; in order to be privileged the fact must also have been communicated to the solicitor for the purpose of obtaining his professional advice and assistance (*t*). The rule was well laid down in the leading case of *Dwyer* v. *Collins* in these terms:—

> The relation of attorney and client prevents the former from disclosing any communication made to him in the ordinary course of his employment and on faith of the confidence which the client reposes in his legal adviser. But the privilege does not extend to matters of fact which the attorney knows by any other means than confidential communication with his client, though, if he had not been employed as attorney, he probably would not have known them. Thus he may prove the client's swearing to the truth of an answer in Chancery; and his handwriting, by seeing it in documents prepared by him in the

(*r*) *Lyell* v. *Kennedy* (1883) 9 A. C. 81, 87.

(*s*) *Ibid.*

(*t*) *Ex parte Campbell, Re Cathcart* (1870) 5 Ch. 703; *Gardner* v. *Irvin* (1878) 4 Ex. D. 49, 53.

name of his employer; in the same way he may prove the fact that a particular document is then in his possession and in court—for this is not a fact professionally communicated to him; though of course he could not be compelled to disclose the contents of any document which is professionally entrusted to him and which he is acquainted with only by virtue of professional confidence (*u*).

One case alone appears to cast any doubt on the rule as thus stated: in *Kennedy* v. *Lyell* (*v*) it was suggested that the true rule may be this, that, where the fact of which disclosure is sought is a fact patent to the senses, the party or witness may be compelled to disclose it notwithstanding that it was communicated to him in the course of a professional communication and under the seal of confidence, provided that no attempt is made to elicit at the same time any belief or opinion or inference of the client connected with it; this proposition however is difficult to reconcile with the general rule as laid down in other decisions and it is submitted that the cases on which it seems to be based (*x*) do not warrant any departure from the statement of the rule in *Dwyer* v. *Collins* which has just been cited.

The limitations or apparent exceptions to this head of privilege dealt with above were admirably summarised by Lord Brougham in the leading case of *Greenhough* v. *Gaskell* (*y*) in the following terms:—

> Those apparent exceptions are where the communication was made before the attorney was employed as such or after his employment had ceased; or where though consulted by a friend because he was an attorney yet he refused to act as such, and was therefore only applied to *as a friend*; or where there could not be said in any correctness of speech to be a communication at all, as where, for instance, a fact, something that was done, became known to him, from his having been brought to a certain place by the circumstance of his being the

(*u*) *Dwyer* v. *Collins* (1852) 7 Ex. 639, 645, 646.

(*v*) 23 Ch. D. 387.

(*x*) Namely, *Brown* v. *Foster* (1857) 1 H. & N. 736; *Sawyer* v. *Birchmore* (1835) 3 My. & K. 572; *Balguy* v. *Broadhursl* (1850) 1 Sim. (N. S.) 111.

(*y*) (1833) 1 My. & K. 98, 104.

attorney, but of which fact any other man, if there, would have been equally conusant (and even this has been held privileged in some of the cases), or where the matter communicated was not in its nature private, and could in no sense be termed the subject of a confidential disclosure; or where the thing disclosed had no reference to the professional employment, though disclosed while the relation of attorney and client subsisted; or where the attorney made himself a subscribing witness and thereby assumed another character for the occasion, and adopting the duties which it imposes became bound to give evidence of all that a subscribing witness can be required to prove. In all such cases it is plain that the attorney is not called upon to disclose matters which he can be said to have learned by communication with his client or on his client's behalf, matters which were so committed to him in his capacity of attorney, and matters which in that capacity alone he had come to know.

Where the parties to the suit occupy towards each other the relation of agent and principal, trustee and *cestui que trust*, corporation and member of the corporation, and the like, and it appears that communications or documents in the possession of such agent, trustee or corporation, which would be entitled as against strangers to this legal professional privilege, have been obtained by them in their aforesaid capacities, the other party will be thereby entitled to have them disclosed and to resist any claim of privilege in respect of the same (*z*). So the communications of a testator to his legal adviser are not protected as between two persons both claiming under him (*a*).

In every case the privilege is the right not of the legal adviser but of the client; it exists for his protection and he alone can waive it; without his consent his legal adviser will not be allowed to disclose any fact or document that is privileged (*b*). But a waiver of a separate part of a privileged communication does not debar him from insisting on it as to

(*z*) *Re Postlethwaite* (1887) 35 Ch. 722; *Mayor and Corporation of Bristol* v. *Cox* (1884) 26 Ch. D. 678.

(*a*) *Russell* v. *Jackson* (1851) 9 Hare, 392.

(*b*) *Pearce* v. *Foster* (1885) 15 Q. B. D. 114.

the residue (*c*). And subject to such waiver, when once communications or statements are privileged they always remain so (*d*), and the privilege is not destroyed by death, but may be claimed by the personal representatives of the client who was entitled to it (*e*).

But although the rule "Once privileged always privileged" undoubtedly prevails to this extent that a document does not lose its privilege by anything short of waiver, this does not affect the admissibility of other evidence to prove the matters to which the privileged documents relate; if for example the party requiring production has at some previous time obtained a copy of the privileged document or has perused its contents, he is at liberty to give secondary evidence of them, if due notice to produce the original has been given. Thus, in an action to try a right of fishery, the defendant, after judgment had been given for the plaintiff, accidentally discovered certain documents prepared for the defence of a previous action dealing with the same subject-matter, which action was defended at the cost of the predecessor in title of the plaintiff. The plaintiff obtained possession of these documents after copies of them had been taken by the defendant. The defendant having appealed from the judgment, the question was discussed in the Court of Appeal whether these documents were privileged, and if so, whether secondary evidence of their contents was admissible; and the court held firstly, following *Minet* v. *Morgan* (*f*), that the documents remained privileged, and secondly, following *Lloyd* v. *Mostyn* (*g*), that the defendant was not precluded on the ground of privilege from giving secondary evidence of their contents (*h*).

(*c*) *Lyell* v. *Kennedy* (1884) 27 Ch. D. 1.

(*d*) *Pearce* v. *Foster* (1885) 15 Q. B. D. 114; *Bullock* v. *Corry* (1878) 3 Q. B. D. 356; *Haslam Foundry, &c.* v. *Hall* (1887) 3 T. L. R. 776.

(*e*) *Bullivant* v. *A.-G. for Victoria* [1901] A. C. 196.

(*f*) (1874) 8 Ch. 361.

(*g*) (1842) 10 M. & W. 478, 481, 482.

(*h*) *Calcraft* v. *Guest* [1898] 1 Q. B. 759. And see p. 396.

§ 3. Husband and Wife.

By the common law husband and wife were either not competent or not compellable to give evidence on many matters which may be classified as follows.

In the first place it was a rule of the common law, "founded on decency, morality, and policy" (*i*), that upon any issue as to the legitimacy of the offspring of a married woman born after her marriage neither she nor her husband was compellable or competent to give evidence of their having had or not having had sexual connection with each other after the marriage; that is, although they might give evidence of the date of their marriage and of the date of the birth of the offspring of the wife, whether born before or after marriage, they might not give any evidence either direct or circumstantial of Access or Non-Access during matrimony (*k*). Nor did the fact that one of them had died release the other from his or her incompetency to give evidence of this description (*l*). The older cases show that the rule also excluded the written or spoken declarations of either of them, tending to prove access or non-access, from being given in evidence by other persons on the issue of legitimacy either during the life or after the death of the declarant (*m*); but these cases must be read in connection with, or subject to, certain cases which have decided that on an issue as to the legitimacy of a child of the wife her declarations and conduct tending to prove the negative of that issue are admissible (*n*).

(*i*) Per Lord Mansfield, *Goodright* v. *Moss* (1777) 2 Cowp. 591.

(*k*) See last note; and *R.* v. *Sourton* (1836) 5 A. & E. 180.

(*l*) *R.* v. *Kea* (1809) 11 East, 132; *Wright* v. *Holdgate* (1850) 3 C. & K. 158.

(*m*) *Goodright* v. *Moss* (1777) 2 Cowp. 591; *Legge* v. *Edmonds* (1855) 25 L. J. Ch. 125; *Wright* v. *Holdgate*, *supra*; but see *Hargrave* v. *Hargrave* (1848) 2 C. & K. 701.

(*n*) See *Aylesford Peerage* (1885) 11 A. C. 1; and cf. *Hargrave* v. *Hargrave* (1848) 2 C. & K. 701. See above, pp. 56, 207, 208, 215, 216. As to the

Again, by the common law husband and wife were neither compellable nor competent to disclose in evidence any Communications upon any matter whatsoever which had passed between them during marriage. This disability did not extend to communications between husband and wife before marriage, but as to those made during marriage it continued after the marriage was dissolved by death or divorce (*o*).

Lastly, the husband and wife were entitled by the common law to the privilege, which has been already referred to, of refusing to give any evidence tending to prove that he or she had been guilty of Adultery (*p*).

The common law as thus stated has been in part confirmed and in part modified by the following statutes:—

The Evidence Amendment Act, 1853 (*q*), which removed the incompetency of the husbands and wives of parties to civil proceedings except proceedings in consequence of adultery, enacted by sect. 3 that—

> No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.

The Evidence Act of 1869 (*r*) enacted by sect. 3 that—

> The parties to any proceeding instituted in consequence of adultery and the husbands and wives of such parties shall be competent to give evidence in such proceeding; provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given

admissibility of the declarations of the paramour, see *Burnaby* v. *Baillie* (1889) 42 Ch. D. 282. The view that such declarations are part of the res gestæ seems to be open to question.

(*o*) *Doker* v. *Hasler* (1824) R. & M. 198; *O'Connor* v. *Majoribanks* (1842) 4 M. & G. 435.

(*p*) See pp. 269, 270, above.

(*q*) 16 & 17 Vict. c. 83; cf. p. 129.

(*r*) 32 & 33 Vict. c. 68; cf. p. 129.

evidence in the same proceeding in disproof of his or her alleged adultery.

The Criminal Evidence Act, 1898 (*s*), provides that neither husband nor wife shall be compellable to disclose communications between them during marriage in terms almost identical with those of the Evidence Amendment Act, 1853, just cited.

The law as it now stands appears therefore to be as follows.

With regard to Access or Non-Access during matrimony husband and wife are still neither compellable nor competent to give evidence direct or circumstantial in any proceedings other than proceedings instituted in consequence of adultery. In proceedings instituted in consequence of adultery it seems that either of them is competent to give such evidence whenever it is relevant to the issue, if he or she thinks fit to waive the privilege, and in that case they become compellable to answer questions in cross-examination upon the evidence so given by them (*t*). And when a party to such a proceeding has in his examination-in-chief denied the truth of some of the charges of adultery contained in the pleadings, and is asked no question as to others, he or she is compellable to answer questions in cross-examination respecting all the charges contained in the pleadings (*u*). In proceedings not instituted in consequence of adultery, such as proceedings in the Chancery Division in relation to the administration of trusts (*x*), and applications for the payment of maintenance (*y*), the common law rule prohibiting this head of evidence is still in force. But the rule does not extend to

(*s*) See Appendix B, p. 468, below.

(*t*) *Hebblethwaite* v. *Hebblethwaite* (1869) L. R. 2 P. & D. 29.

(*u*) *Brown* v. *Brown* (1874) L. R. 3 P. & D. 198.

(*x*) *Re Walker* (1885) 53 L. T. 660; *In re R——'s Trusts*, 39 L. J. Ch. 192; cf. *Burnaby* v. *Baillie* (1889) 42 Ch. D. 282.

(*y*) *Guardians of the Poor of Nottingham Union* v. *Tomkinson* (1879) 4 C. P. D. 343; *Re Walker*, *supra*.

protect anyone except the husband and wife themselves, and accordingly evidence of other persons may always be given to prove facts from which non-access may be inferred, as for example the adultery of the wife, the physical incapacity of the husband, their separation and residence at a distance from each other, the reputation of the illegitimacy of the children, and so forth (*z*). And where the question of legitimacy depends not on access but on the date of the marriage in relation to the birth, or on the celebration or validity of the marriage, the rule has no application, and in such cases any evidence or declarations of the husband and wife otherwise admissible are not affected by it (*a*). After a separation order has been made by the court and acted on by the parties, the presumption of access and legitimacy is of course reversed.

With regard to Communications between husband and wife during the marriage it would seem that neither husband nor wife is now incompetent to give evidence; but each of them is entitled to the privilege of not disclosing such communications in any proceedings whatsoever, although if either of them should waive the privilege and give evidence thereon, they would of course render themselves liable to cross-examination with regard to the same.

With regard to Adultery husband and wife are still entitled to their common law privilege, and are only compellable to answer questions tending to establish their guilt when they have themselves given evidence in disproof of the adultery.

It has been suggested that the effect of section 3 of the Evidence Act, 1869, is to confine the privilege in respect of evidence of adultery to parties and witnesses in proceedings

(*z*) *Hawes* v. *Draeger* (1883) 23 Ch. D. 173, and the other cases cited in the notes to this section.

(*a*) *Murray* v. *Milner* (1879) 12 Ch. D. 845; *Watson* v. *Little* (1860) 29 L. J. Ex. 267; *A.* v. *A.*, 25 L. J. Ch. 136, note (3).

instituted in consequence of adultery (*b*); but this view does not appear to be sound, and is inconsistent with the grounds of the decision given in a subsequent case by the Court of Appeal (*c*).

§ 4. Documents and Affairs of State.

Documents of State are absolutely privileged. This means that when the privilege is duly asserted, whether by some department of state, or by the court of its own motion, it is not in the power of any litigant or witness to waive or disregard the privilege so asserted.

The term Documents of State comprises written statements brought into existence by officers of state in the course of the performance by them of their public duties, such as records, minutes, and reports of official acts or opinions, communications between one officer of state and another, and even communications between such officers of state and third persons. Among the examples presented by the cases are communications made by the Secretary of State for India in Council to the Parliamentary Under Secretary for India (*d*); letters of complaint on matters of public concern addressed to the Colonial Secretary (*e*); communications from a British Minister at a foreign Court to the Foreign Secretary at home (*f*); communications between the East India Company and the Board of Control (*g*); dispatches,

(*b*) *M.* (otherwise *D.*) v. *D.* (1884) 10 P. D. 175.

(*c*) *Redfern* v. *Redfern* [1891] P. 139; and cf. *S.* (otherwise *G.*) v. *S.* [1907] P. 224.

(*d*) *Chatterton* v. *Secretary of State for India in Council* [1895] 2 Q. B. 189.

(*e*) *Anderson* v. *Hamilton* (1816) 2 B. & B. 156, note (*b*).

(*f*) *Beatson* v. *Skene* (1860) 29 L. J. Ex. 430, 437; given by way of illustration in the judgment.

(*g*) *Smith* v. *East India Co.* (1841) 1 Ph. 50.

reports and other communications which have passed between the governor of a colony, and a commissioner appointed to inquire into its affairs, and the Colonial Secretary (*n*); minutes and reports of military courts of inquiry and the complaints and evidence laid before them (*o*), as well as letters from one officer to another directing the holding of such inquiry (*p*); reports from commanding officers of the King's ships to the Lords Commissioners of the Admiralty in pursuance of official regulations (*q*); reports from the chief cashier of the Board of Inland Revenue to the Accountant-General (*r*); and balance-sheets delivered by the auditors of a limited company to the Surveyor of Inland Revenue for the purpose of assessment of income tax (*s*).

The ground of the rule is that the publication of such documents would be injurious to the public interest by reason of danger or prejudice to the conduct of government and the management of public affairs, and the tendency which the publication of such documents would have to check free communication and intercourse between officers of state of whatever degree with regard to public affairs (*t*). In the words of Field J. in *Hennessy* v. *Wright* (*u*)—

> There are two aspects of this question. First, the publication of a State Document may involve danger to the nation. If the confidential communications made by servants of the Crown to each other, by superiors to inferiors, or by inferiors to superiors, in their discharge of their duty to the Crown were liable to be made public in a court of

(*n*) *Hennessy* v. *Wright* (1888) 21 Q. B. D. 509.

(*o*) *Home* v. *Bentinck* (1820) 2 B. & B. 130; *Beatson* v. *Skene* (1860) 29 L. J. Ex. 430; *Dawkins* v. *Rokeby* (1873) L. R. 8 Q. B. 255.

(*p*) *Ford* v. *Blest* (1890) 6 L. T. R. 295.

(*q*) *H.M.S. Bellerophon* (1874) 44 L. J. P. M. & A. 5.

(*r*) *Hughes* v. *Vargas* (1893) 9 T. L. R. 551.

(*s*) *In re Joseph Hargreaves, Ltd.* [1900] 1 Ch. 347.

(*t*) See cases cited in this section.

(*u*) At p. 512.

justice at the instance of any suitor who thought proper to say "*fiat justitia ruat cœlum*," an order for discovery might involve the country in a war. Secondly, the publication of a State document may be injurious to servants of the Crown as individuals. There would be an end of all freedom in their official communications, if they knew that any suitor, that, as in this case, any one of their own body whom circumstances had made a suitor, could legally insist that any official communication, of no matter how secret a character, should be produced openly in a court of justice.

It follows from the reasons on which the rule is based that the privilege excludes from evidence not only original documents, but also secondary evidence of their contents by means of copies or otherwise (*x*).

On the question whether a given case comes within the rule, that is to say, whether the publication of documents sought to be disclosed would be prejudicial to public interests it is the general rule that the courts defer to the opinion duly expressed by those entitled to speak for the department concerned; the head of the department having duly asserted the privilege on the ground that the publication of the document would be prejudicial to the public interest, the court will accept and act on his statement; it is only in case of manifest error on the part of the public officer or when the matter is submitted by the department itself to the judgment of the court, that the court will act on its own opinion (*y*).

The objection may be brought to the notice of the court either by the head of the department himself (*z*), or by some official duly authorised by him to do so (*a*); and the objection

(*x*) *Home* v. *Bentinck*, *Dawkins* v. *Rokeby*, *Hughes* v. *Vargas*, and *Chatterton* v. *Secretary of State for India in Council* [1895] 2 Q. B. 189.

(*y*) *Beatson* v. *Skene* (1860) 29 L. J. Ex. 430, 437; *Hennessy* v. *Wright* (1888) 21 Q. B. D. 509, 515, 521; *Hughes* v. *Vargas* (1893) 9 T. L. R. 551; *In re Joseph Hargreaves, Ltd.* [1900] 1 Ch. 347.

(*z*) *Beatson* v. *Skene* (cited in last note), at p. 433; *Anderson* v. *Hamilton* (1816) 2 B. & B. 156.

(*a*) *Ibid.* 431; *Hughes* v. *Vargas*, note (*y*) above; *In re Joseph Hargreaves, Ltd.* [1900] 1 Ch. 347.

may be put forward either orally by such person at the hearing (*b*) or by a written communication from the head of the department direct to the judge (*c*); or by affidavit, if the question arises upon an application for discovery (*d*); but it may be doubtful whether it is sufficient for a party merely to make an affidavit setting forth the instructions of the public department where the privilege is doubtful and the court therefore requires assistance of the department (*e*); and it will be prudent for the party or person relying on the privilege to see that his affidavit gives a sufficient description of the documents sought to be withheld and states the claim of privilege in clear terms (*f*).

Where the right to privilege is apparent on the face of the case, it is the duty of the court to take notice of it and enforce it, whether objection has been taken by the department concerned or not (*g*).

The privilege extends no less to oral communications than to written ones (*h*).

In connection with this head of privilege we may refer to the Official Secrets Act, 1889 (*i*), under which breaches of official trust by government officials are made punishable as felonies or misdemeanours.

(*b*) See cases cited in last two notes.

(*c*) *Beatson* v. *Skene* (1860) 29 L. J. Ex. 430, 431.

(*d*) *H.M.S. Bellerophon* (1874) 44 L. J. P. M. & A. 7; *Hennessy* v. *Wright* (1888) 21 Q. B. D. 509.

(*e*) *Hennessy* v. *Wright* (1888) 21 Q. B. D. 509, 517, 518.

(*f*) *Kain* v. *Farrer* (1877) 37 L. T. N. S. 469, which is, however, criticised in case cited in last note at pp. 522, 523.

(*g*) *Hennessy* v. *Wright* (1888) 21 Q. B. D. 509, and numerous cases cited in the judgment.

(*h*) *Beatson* v. *Skene* (1860) 29 L. J. Ex. 430; *Dawkins* v. *Rokeby* (1873) L. R. 8 Q. B. 255.

(*i*) 52 & 53 Vict. c. 52.

§ 5. Title-Deeds.

Title-deeds are also privileged from disclosure in the cases and to the extent hereinafter mentioned.

The term title-deed comprises documents other than deeds in the ordinary sense of that word, as for instance a will, or an agreement not under seal for the sale of an estate; it is the contents of the document which constitute it a title-deed by their relation to some right or title which they support; hence the mere detention of a document by virtue of a lien in respect of some claim asserted by the detainer against the owner of it does not render it a title-deed in respect of the detainer's claim within the meaning of this rule (*k*).

In respect of production of title-deeds there is a great difference between the position of a party to civil proceedings and other persons.

With regard to persons who are not parties to the suit the rule was the same both at common law and in equity, and has not been affected by the Judicature Acts. It is this: that such person is not compellable to produce his title-deeds for inspection (*l*). He may be compelled by a writ of *subpœna duces tecum* to bring them into court (*m*), and the party at whose instance he has been summoned may have him called on his subpœna, and without having him sworn, may ask him if he has the documents in his possession, if he has brought them there, if he is willing to produce them, and, if not, on what grounds he objects (*n*). But if the person so summoned refuses to produce the documents on the ground that they are his title-deeds, then, provided that that

(*k*) See below, pp. 297, 298.

(*l*) *Harris* v. *Hull* (1822) 3 St. 140; *Pickering* v. *Noyes* (1823) 1 B. & C. 262; *Doe* v. *James* (1837) 2 M. & R. 47; *Doe* v. *Clifford* (1847) 2 C. & K. 448; *Doe* v. *Langdon* (1848) 12 Q. B. 711.

(*m*) *Pickering* v. *Noyes* (1823) 1 B. & C. 262.

(*n*) *Griffith* v. *Ricketts* (1849) 7 Ha. 299.

allegation does not appear to be manifestly false, he is privileged from producing them and cannot in that case be compelled to answer any question with regard to their contents (*o*).

The case of parties to civil proceedings is different. Before 1851 they also could not be compelled by *subpœna duces tecum* or otherwise to produce their title-deeds (*p*). But by Lord Brougham's Act (*q*), and the Common Law Procedure Act, 1854 (*r*), power was given to either party to obtain discovery in an action in every case where it could have been obtained by a bill in equity. The general principle in equity was that a party could obtain discovery of all such title-deeds in his opponent's possession as did not exclusively support his opponent's title but tended to prove or support his own case; but could not obtain discovery of those which did relate exclusively to his opponent's case and did not tend to prove or support his own (*s*). Since 1875 the practice has followed this principle in every Division of the High Court (*t*). And the test of admissibility of such documents will be decided on the same principle at the hearing, subject

(*o*) *Davies* v. *Waters* (1842) 9 M. & W. 608; and see below, p. 400.

(*p*) *Ibid.*; and *Pickering* v. *Noyes* (1823) 1 B. & C. 262.

(*q*) 14 & 15 Vict. c. 99.

(*r*) 17 & 18 Vict. c. 125 s. 50 *seq.* See Day's Com. Law. Proc. Acts, 4th ed., 1872, pp. 295 *seq.*

(*s*) See Hare on Discovery; Wigram on Discovery; *Minet* v. *Morgan* (1873) 8 Ch. 361. In this case the plaintiff sought to protect certain documents from disclosure by swearing that "they related exclusively to his title, and to the best of his knowledge, information and belief did not contain anything impeaching his case or forming or supporting the defendant's title or the defendant's case, and were not in any manner material to the case of the defendant as to any matter in dispute between the plaintiff and the defendant in this suit." This was held sufficient to protect the documents from production. For an illustration of the same principle applied to interrogatories, see *Hooton* v. *Dalby* [1907] 2 K. B. 18.

(*t*) *Morris* v. *Edwards* (1890) 15 App. Ca. 309. In this case it was held that it is sufficient for a party to swear that the documents relate solely to his own title and do not in any way tend to prove or support the title of his opponent: it is not necessary for him to add that they do not impeach his own title.

to this, that the oath of the party is generally conclusive on a question of discovery, whereas at the hearing the court may allow the matter to be probed farther.

By Rule 12 of Order XXXI of the Rules of the Supreme Court a party may be ordered to make discovery on oath of "the documents which are or have been in his possession or power relating to any matter in question therein." It might be thought that the words "relating to any matter in question therein" were intended to give wider limits to the discovery of other documents than those laid down in the case of title-deeds. The Court of Appeal has however otherwise decided in two recent cases (*u*). The latter of these was an action by a shareholder against a company for alleged misrepresentation in a prospectus, the statement complained of being that 12,500 persons had enrolled themselves as annual subscribers to the company. In an affidavit of documents the defendants stated that they had in their possession 12,500 applications by persons wishing to be enrolled as annual subscribers to the company, but they objected to produce them on the ground that they were part of the evidence supporting the defendants' case and did not support or tend to support the plaintiff's case, and contained nothing impeaching the case of the defendants. The court held that the defendants were entitled to withhold inspection of the documents.

The result therefore seems to be this, that a party to litigation can no longer claim privilege for his title-deeds, but is only entitled to this particular application of the principle of relevancy which disallows "fishing" applications (*v*) for discovery, and is equally applicable, though not so often applied with strictness, to all other documents.

If, as happens not infrequently in questions of boundary,

(*u*) *Budden* v. *Wilkinson* [1893] 2 Q. B. 432; *Frankenstein* v. *Gavin's Cycle Cleaning and Insurance Co.* [1897] 2 Q. B. 62.

(*v*) For the meaning of this term, see cases in note (*s*) on last page, and see pp. 246, 247, below.

it appears that only portions of a party's documents of title are relevant to his opponent's case, he is allowed to disclose those parts alone, sealing up the rest (*x*).

The rules above stated are chiefly illustrated by cases relating to discovery, but the party would no doubt be allowed to insist on them no less if the documents were first called for during the trial.

Whenever title deeds are lawfully withheld under a claim of privilege, secondary evidence of their contents is admissible (*y*).

The rules relating to a document detained under lien were once unsettled, but now stand on a clear footing (*z*). The detainer cannot of course be compelled under the *subpœna duces tecum* to deliver up the document to the defeat of his lien (*a*), but he is compellable to produce it in evidence (*b*), except in the case where the party calling for it is himself the person who owes to the detainer the very charges in respect of which the lien is claimed (*c*). The above general principle has been followed in bankruptcy proceedings (*d*); and has been applied to the debtor's account books by express provision in the bankruptcy rules (*e*). It has also been

(*x*) *Jenkins* v. *Bushby* (1866) 35 L. J. Ch. 400; *Ponsonby* v. *Hartley*, W. N. (1883) p. 13.

(*y*) *Doe* v. *Ross* (1840) 7 M. & W. 102, explained in *Hope* v. *Liddell* (1855) 24 L. J. Ch. 691—694; *Doe* v. *Clifford* (1847) 2 C. & K. 448; *Doe* v. *Langdon* (1848) 12 Q. B. 711; and see p. 396.

(*z*) *Hope* v. *Liddell* (1855) 24 L. J. Ch. 691.

(*a*) *Ibid.*; and *Warburton* v. *Edge* (1839) 9 Sim. 508.

(*b*) *Ibid.*; and *In re Hawkes* [1898] 2 Ch. 1; *Furlong* v. *Howard* (1804) 2 Sch. & Lef. 115; *Brassington* v. *Brassington* (1823) 1 S. & St. 455; *Hunter* v. *Leathley* (1830) 10 B. & C. 858; *Thompson* v. *Moseley* (1833) 5 C. & P. 501; *Lee* v. *Barlow* (1848) 1 Ex. 800; *Re Cameron's Coalbrook, &c. Rail. Co.* (1857) 25 Beav. 1. And of course none the less if either the party claiming the lien or the party against whom it is claimed happens to be a party to the action: *Pratt* v. *Pratt* (1882) 51 L. J. Ch. 838; see *Brassington* v. *Brassington*.

(*c*) *In re Hawkes* [1898] 2 Ch. 1; *Kemp* v. *King* (1842) 2 M. & R. 437; *Re Gregson* (1858) 26 Beav. 87; but see *Fowler* v. *Fowler* (1881) 50 L. J. Ch. 686.

(*d*) *Re Toleman and England* (1880) 13 Ch. D. 885.

(*e*) See rule 349 under Act of 1883.

expressly enacted in respect of liquidations by the Companies Winding-up Act (*f*).

§ 6. Privileged Admissions in Civil Cases.

The general nature of admissions, as a medium of proof or form of testimony, has been dealt with in a former chapter (*g*).

An admission made to a stranger, under whatever terms as to secrecy, is not protected by the law from disclosure (*h*). But when an admission has been made to the opposite side on the understanding that it is not to be used against the party making it, it is privileged. Such admissions are commonly made in the course of negotiations between the parties or their agents with a view to the compromise of the claim which is or afterwards becomes the subject of litigation, and the usual way by which the person making the admission secures the privilege is by stipulating that the communications are to be "Without prejudice." When this condition is attached to an offer it is held to mean that while the party to whom the offer is made is entitled to accept it (in which case there is a new contract between the parties which can of course be proved and enforced), yet if the offer is not accepted, no use is to be made of it to the prejudice of the party making it, which of course imports that it is not to be used in evidence against him (*i*). The privilege attaches equally to the answer which is made to such offer, and extends to all the subsequent communications which appear to be made in continuation of it, and in reliance on the pro-

(*f*) 25 & 26 Vict. c. 89 s. 115; *Re South Essex, &c. Co.* (1869) 4 Ch. 215; *Re Capital Fire Ins. Ass.* (1883) 24 Ch. D. 408.

(*g*) For the definition of an admission as used here, see pp. 149, 150.

(*h*) *McCorquodale* v. *Bell* (1876) 1 C. P. D. 471, 476; *Wheeler* v. *Le Marchant* (1881) 17 Ch. D. 675, 681, 682.

(*i*) *Re River Steamer Co.* (1871) 6 Ch. 822; *Walker* v. *Wilsher* (1889) 23 Q. B. D. 335.

tection thus established (*k*). The rule applies equally whether the communications be written or by word of mouth (*l*). The only qualification of the rule is that sometimes the parties may be entitled to refer generally to the fact that some negotiations have passed, in order, for instance, to explain the lapse of time (*m*). Moreover, if a party during the course of negotiations for a compromise makes admissions not with a view to such compromise but wholly independently (*n*), and still more if he commits acts, which are of themselves a ground of legal liability (such as for instance threats to infringe a patent right (*o*)), these are not privileged.

There has been some difference of judicial opinion as to whether admissions, whether express or implied from the offer of concessions, are privileged by the mere fact that they have been made in the course of negotiations for a settlement (*p*). The true view would seem to be that they are not privileged unless it can be implied from the language or conduct of the parties that they were not intended to be disclosed, but that this inference will frequently be drawn almost as a matter of course from the nature and circumstances of the case.

In cases where a party wronged has a choice of civil or criminal remedy and where accordingly it is held lawful to enter into a compromise of the criminal liability (*q*), there

(*k*) *Walker* v. *Wilsher* (1889) 23 Q. B. D. 335; *Ex parte Harris, Re Harris* (1875) 44 L. J. Bkcy. 33.

(*l*) *Walker* v. *Wilsher*, cited in last note.

(*m*) *Ibid.*; and *Jones* v. *Foxall* (1852) 15 Beav. 390, 396, 397.

(*n*) *Waldridge* v. *Kennison* (1794) 1 Esp. 142; *Turner* v. *Railton* (1796) *ibid.* 474.

(*o*) *Kurtz & Co.* v. *Spence* (1887) 57 L. J. Ch. 238.

(*p*) For the privilege, *Jardine* v. *Sheridan* (1846) 2 C. & K. 24; against, *Nicholson* v. *Smith* (1822) 3 St. 128; *Wallace* v. *Small* (1830) M. & M. 446; an intermediate position was taken by Kenyon C. J. in *Turner* v. *Railton* (1796) 1 Esp. 474; and *Gregory* v. *Howard* (1800) 3 Esp. 113.

(*q*) *Keir* v. *Leeman* (1844) 6 Q. B. 308, 321; 9 Q. B. 395; and *Fisher* v. *Apollinaris Water Co.* (1875) 10 Ch. 297.

seems no reason why admissions should not be privileged on the same principle as in purely civil cases as above explained.

§ 7. Privileged Admissions in Criminal Cases.

The general nature of confessions as a medium of proof or form of testimony has been dealt with in a former chapter (*r*).

In criminal cases it is a rule that no confession of the defendant can be given in evidence against him unless it was voluntary, and it is held not to be voluntary if it appears to have been induced by anything in the nature of promise or a threat held out to him by any person in authority (*s*). In the words of Cave J. in the recent case of *R.* v. *Thompson* (*s*), "By that law (the law of England) to be admissible, a confession must be free and voluntary. If it proceeds from remorse and a desire to make reparation for the crime, it is admissible. If it flows from hope or fear, excited by a person in authority, it is inadmissible. On this point the authorities are unanimous." They have not been so as to the ground of the rule; but it was said by Pollock C. B. in *R.* v. *Baldry* (*t*), that the true ground of the exclusion is not that there is any presumption of law that a confession not free and voluntary is false, but that it would not be safe to receive a statement made under any influence or fear; and this appears to have been adopted in the judgment of the Court for Crown Cases Reserved in the recent case of *R.* v. *Thompson* (*u*).

It does not lie on the defendant to prove the threat or promise, but it is for the prosecutor to satisfy the judge that any confession he tenders in evidence is voluntary (*x*); the evidence on this point is preliminary and is addressed to the

(*r*) See above, pp. 149, 150.

(*s*) *R.* v. *Baldry* (1852) 2 Den. C. C. 430, 445; *R.* v. *Thompson* [1893]]2 Q. B. 12, 15.

(*t*) See last note.

(*u*) [1893] 2 Q. B. 12.

(*x*) *R.* v. *Warringham* (1851) 2 Den. C. C. 447, note.

judge, who will require the prosecutor to show to his satisfaction that the statement was not made under the influence of an improper inducement, and who, in the event of any doubt subsisting on this head, will reject the confession (*y*). The principle on which this rule rests is of the first importance in the administration of the criminal law, and hence the words of admonition of Lord Russell C. J. delivering the judgment of the court in *R.* v. *Rose* (*z*): "It is to be borne in mind not only by magistrates but by prosecuting counsel and by solicitors having the charge of prosecutions that they must satisfy themselves before putting a confession in evidence that the confession was not obtained under such circumstances as to be inadmissible."

Such promise or hope, threat or fear—and also the term "authority"—must all be understood in relation to the prosecution. That is to say, a person is deemed to be a person in authority within the meaning of this rule only if he stands in certain relations which are considered to imply some power of control or interference in regard to the prosecution. The threat must be a threat to prosecute or take some step adverse to the defendant's interests connected therewith, and the promise must be promise to forbear from some such course. The most conspicuous example is the case of an offer of pardon held out by a secretary of state to any accomplice who will make such confession as will lead to the detection and punishment of the principal offender. A person who purports to make a confession in reliance on such an offer may fail to obtain the pardon, if it appear either that he was himself a principal or that he has failed to make a complete disclosure; but if prosecuted for his part in the crime, no admission can be given in evidence against him which appears to have been made solely in reliance on the promise of

(*y*) *R.* v. *Thompson* [1893] 2 Q. B. 12, 16.
(*z*) (1898) 78 L. T. 119, 120.

pardon (*a*). The term "person in authority" has been held to comprise any officer of justice having the custody of the defendant, as magistrate (*b*), police constable (*c*), warder (*d*) or searcher (*e*); also the prosecutor (*f*); and any person who is virtually in the position of the prosecutor's agent with regard to the custody of the defendant or the complaint made against him (*g*). It is doubtful whether a medical man who is simply called in to attend to a prisoner can be deemed a person in authority (*h*). It is not necessary that the promise or threat should be actually uttered by the person in authority, if it was uttered by some one else in his presence and tacitly acquiesced in by him, so as to appear to have his confirmation and authority (*i*). Nor need it be made directly to the defendant himself; it is the same thing if it be made to a relative of the defendant or any other person on his behalf, with the expectation that it will be communicated to him, and it is in fact communicated (*k*).

The terms of the inducement constantly involve both threat and promise, a threat of prosecution if disclosure is not made, a promise of forgiveness if it is. The following for instance have been held to be such statements when made by persons in authority: "If you don't tell the truth . . . I

(*a*) *R.* v. *Dingley* (1845) 1 C. & K. 637; *R.* v. *Blackburn* (1853) 6 Cox, 333.

(*b*) *R.* v. *Cooper* (1833) 5 C. & P. 535; see *R.* v. *Parker* (1861) L. & C. 42.

(*c*) *R.* v. *Pountney* (1836) 7 C. & P. 302; *R.* v. *Laugher* (1846) 2 C. & K. 227; *R.* v. *Millen* (1849) 3 Cox, 507.

(*d*) *R.* v. *Enoch* (1833) 5 C. & P. 539.

(*e*) *R.* v. *Windsor* (1864) 4 F. & F. 360.

(*f*) *R.* v. *Jones* (1809) R. & R. 152.

(*g*) *R.* v. *Taylor* (1839) 8 C. & P. 733; *R.* v. *Moore* (1852) 2 Den. C. C. 522; *R.* v. *Sleeman* (1853) Dears. C. C. 249.

(*h*) *R.* v. *Gibbons* (1823) 1 C. & P. 97; *R.* v. *Kingston* (1830) 4 C. & P. 387. The admissibility of a confession in such case might perhaps be held to turn on the question whether the prisoner believed on reasonable grounds that he was a person in authority.

(*i*) *R.* v. *Laugher* (1846) 2 C. & K. 225; *R.* v. *Taylor* (1839) 8 C. & P. 733.

(*k*) *R.* v. *Thompson* (1893) 2 Q. B. 12. In this case it was not proved whether the communication had taken place or not, but the whole argument assumed that such a mode of communication was within the present rule.

will send for the constable to take you" (*l*), "If you don't tell me, I will give you in charge of the police till you do tell me" (*m*). But the threat need not be in express terms, if the intention is still clear, as in the case of the following statements: "If you don't tell, you may get yourself into trouble and it will be the worse for you" (*n*); "If you (the person in authority) forgive me, I (the prisoner) will tell you the truth." Reply: "Ann, did you do it?" (*o*). At one time almost any invitation to make a disclosure was held to imply some threat or promise, but a sounder practice has since prevailed and the words used are construed in their natural sense, so that many of the older decisions are no longer safe guides (*p*). Such expressions therefore as "I must know more about it" are no longer held to amount to a threat (*q*). There is however one form of inducement, namely, "You had better tell the truth," and equivalent expressions, which are regarded as having acquired a fixed meaning in this connection, as if a technical term, and are always held to import a threat or promise (*r*). But this construction will not prevail if such a statement is accompanied by other words which indicate that it was not intended in this sense; as "You had better, as good boys, tell the truth" (*s*). Inducements which consist merely of an appeal to a man's moral or religious feelings, however urgent, will not render a confession inadmissible (*t*). Such are the following: "I hope you will tell, because Mrs. Gurner can ill afford to

(*l*) *R.* v. *Hearn* (1841) C. & M. 109.

(*m*) *R.* v. *Luckhurst* (1853) Dears. C. C. 245.

(*n*) *R.* v. *Coley* (1868) 10 Cox, 536.

(*o*) *R.* v. *Mansfield* (1881) 14 Cox, 639.

(*p*) *R.* v. *Baldry* (1852) 2 Den. C. C. 430, 445; *R.* v. *Reason* (1872) 12 Cox, 228.

(*q*) See last case.

(*r*) *R.* v. *Jarvis* (1867) L. R. 1 C. C. R. at p. 99; *R.* v. *Fennell* (1881) 7 Q. B. D. 147.

(*s*) *R.* v. *Reeve* (1872) L. R. 1 C. C. R. 362.

(*t*) *R.* v. *Gilham* (1828) Moo. C. C. 186.

lose the money" (*u*), "Don't run your soul into more sin, but tell the truth" (*x*), "You are in the presence of two police officers, and I should advise you that to any question that may be put to you you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue." . . . "Take care, we know more than you think" (*y*). Nor will inducements create privilege which merely promise some collateral convenience, such as permission to the defendant to see his wife (*z*), or to have the handcuffs removed (*a*). If the confession was not induced by threat or promise, it is, strictly speaking, admissible even though the witness promised (*b*), or swore (*c*), not to reveal it, or even obtained it by indirect means as by making the defendant intoxicated (*d*), or intercepting and opening a letter (*e*).

Confessions made by a prisoner in answer to questions put to him by the police have in some cases been excluded from evidence even where there has been no promise or threat. The cases on the subject present considerable conflict and it is difficult to extract from them any general principle, but the matter may perhaps be stated thus:—It is a general principle that *Nemo tenetur se ipsum accusare*, in other words no man is bound to answer questions or make statements incriminating himself (*f*); a constable has no statutory right to examine a prisoner at all, though it is not illegal for him to put questions to him; and if the courts were to sanction this as a regular practice, prisoners would be constantly exposed to

(*u*) *R.* v. *Lloyd* (1834) 6 C. & P. 393.
(*x*) *R.* v. *Skeeman* (1853) Dears. C. C. 249.
(*y*) *R.* v. *Jarvis* (1867) L. R. 1 C. C. R. 96.
(*z*) *R.* v. *Lloyd* (1834) 6 C. & P. 393.
(*a*) *R.* v. *Green*, *ibid.* 655.
(*b*) *R.* v. *Thomas* (1836) 7 C. & P. 345.
(*c*) *R.* v. *Shaw* (1834) 6 C. & P. 372.
(*d*) *R.* v. *Spilsbury* (1835) 7 C. & P. 187.
(*e*) *R.* v. *Derrington* (1826) 2 C. & P. 418.
(*f*) See above, pp. 150, 151; and see *R.* v. *Coote* (1873) L. R. 4 P. C. 599, 607.

such unfair pressure with a view of eliciting confessions from them that the above principle would be of little value to them. And hence the courts have often strongly discouraged the practice of constables interrogating prisoners at all, they have also not infrequently excluded confessions thus obtained on the ground presumably that in those particular cases the answers have in their opinion been obtained by what in effect amounted to duress. These cases seem to lie half-way between those dealt with in the first section of this chapter relating to Penal Consequences and those which form the subject of the present one.

An inducement may continue to operate on a man's mind for a considerable time after it was uttered (*h*); but on the other hand it may be altogether removed by subsequent statements which precede the confession, and which clearly inform the defendant that he must expect no temporal advantage from making one (*i*). In one case an inducement was held to have operated although it was made with regard to a different offence (*k*); but in every case it is for the judge to decide whether a confession was made in reliance on it or not.

The question not infrequently arises in what form evidence may be given of facts which have been discovered in consequence of an admission which is privileged under this rule; as where a defendant charged with theft has, under the influence of threats, revealed where the stolen property is hidden. It is clear that the finding of the stolen things may be proved; it is also clear that the confession as such cannot on that ground be proved; is it lawful to ask the witness a question to this effect: "Did you *in consequence of a statement which the prisoner made to you* find the articles in question?" Some

(*h*) *R.* v. *Hewett* (1842) C. & M. 534.
(*i*) *R.* v. *Clewes* (1831) 4 C. & P. 221.
(*k*) *R.* v. *Hearn* (1841) C. & M. 109.

authorities are in favour of the admissibility of the question, others opposed to it (*l*). On principle the latter would seem to be the right view; if the confession is wholly inadmissible, it can hardly be right to give the jury in an indirect manner so clear an indication of what the tenor of the confession was.

The principle that a confession is not admissible unless voluntary has been applied by statute to statements made by a prisoner in the course of his so-called examination before a justice prior to his committal to a court of sessions or assizes for trial.

Sect. 18 of the Indictable Offences Act, 1848 (*m*), provides as follows:—

> After the examinations of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the justice of the peace or one of the justices by or before whom such examination shall have been so completed as aforesaid shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;" and whatever the prisoner shall then say in answer thereto shall be taken down in writing and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned, and afterwards upon the trial of the said accused person the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: provided always that the said justice or justices before such accused person shall make any statement shall state to him, and give him clearly to understand, that he has nothing to hope from any promise

(*l*) For the admissibility: *R.* v. *Griffin* (1809) R. & R. 151, diss. two judges; *R.* v. *Gould* (1840) 9 C. & P. 364. Against it: *R.* v. *Warickshall* (1783) 1 Lea. 263; *R.* v. *Harvey*, 2 East, P. C. 658; cp. also *R.* v. *Mosey* (1784) 1 Lea. C. C. at p. 265 (a).

(*m*) 11 & 12 Vict. c. 42. Cf. p. 151.

of favour and nothing to fear from any threat, which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat: provided nevertheless that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person.

Part IV.

ADDUCTION OF EVIDENCE.

The principle underlying the definition of the Media of Proof, that a party must give the Best Evidence, that is, the most credible evidence that the nature of the case will admit, governs also the Adduction of Evidence, or in other words, the method or procedure to be followed in bringing it before the court. The rules of adduction are designed to ensure that all evidence, whether oral or documentary, shall be presented to the court in such manner as to minimise, so far as general rules can ensure that end, the risk of falsehood and inaccuracy, as well as to see fair play between the parties. These rules do not generally vary (except to a limited extent in the case of documents) according to the different purposes for which the evidence is adduced. In other words, the examination of a witness must be conducted according to the same rules whether he is called to prove directly a relevant fact, as the details of a trespass or the violation of a contract in respect of which the proceeding is brought, or to report some piece of hearsay which the law admits as a medium of proof, as a declaration against interest or an admission by one of the parties. And the same observation applies generally to the rules of proof which govern the adduction of documents.

CHAPTER I.

ATTENDANCE AND EXAMINATION OF WITNESSES.

§ 1. *Compelling Attendance.*
§ 2. *Order of Calling Witnesses.*
§ 3. *Examination-in-Chief.*
(i) *Scope: Facts relevant to the Issue.*
(ii) *Leading Questions.*
(iii) *Examination of Witness who proves Adverse or Hostile.*
(iv) *Question in Issue and Evidence of Experts.*
§ 4. *Cross-Examination.*
(i) *Facts relevant to the Issue.*
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(iii) *Leading Questions.*
§ 5. *Re-examination.*
§ 6. *Refreshing Memory of Witness.*

§ 1. Compelling Attendance.

If a party cannot rely on a witness attending voluntarily to give evidence for him at the trial, his attendance may be compelled in one or other of the following ways.

In civil cases in the Supreme Court, and in references and arbitrations, the proper mode of securing the attendance of a witness is for the party to cause to be issued, and to serve upon the witness, a writ of *subpœna ad testificandum*, or, if he desires to secure that the witness shall not only attend but also bring into court with him any particular documents which are in his custody, a writ of *subpœna duces tecum* instead. The practice with regard to the issue and service of such writs is contained in Rules 26 to 34 of Order XXXVII, and Rules 49, 52A and 55c of Order XXXVI.

The party may without leave of the court cause the *subpœna* to be issued for the examination of the witness at any stage of the action; but the court will exercise a control over the use made of this right to prevent its being exercised oppressively (*b*). The attendance at the trial of any witness who is absent in Scotland or Ireland may be compelled by a *subpœna* to be issued by an order made in chambers (*c*). Should any witness be guilty of wilful disobedience to a *subpœna*, he is liable to attachment for contempt of court (*d*); he is also answerable to the party at whose instance he was served with the writ, for any damages which the latter can show that he has suffered by the loss of his evidence (*e*); but as the witness is entitled to "conduct money" to cover the expenses of travelling and lodging which may be incurred by him in complying with the *subpœna*, he is not liable to these proceedings for default unless a reasonable sum has first been tendered to him for this purpose (*f*).

In criminal cases the attendance of the prosecutor and witnesses for the Crown in the court where the trial is to be held is usually secured by their being bound by recognizance by the committing magistrate under the provisions of the Indictable Offences Act, 1848 (*g*), to appear to prosecute and give evidence at the court of trial. And where a coroner's inquisition charges a person with murder or manslaughter, witnesses examined before him may by virtue of the Coroners

(*b*) *Raymond* v. *Tapson* (1882) 22 Ch. D. 430.

(*c*) 17 & 18 Vict. c. 34 s. 1; Judicature Act, 1884, s. 16; Arbitration Act, 1889, ss. 8 and 18. As to the *subpœna duces tecum*, see below, pp. 361—365.

(*d*) *Barrow* v. *Humphreys* (1820) 3 B. & A. 598; *Scholes* v. *Hilton* (1842) 10 M. & W. 15; *Goff* v. *Mills* (1844) 2 D. & L. 23; *Crowther* v. *Appleby* (1873) L. R. 9 C. P. 23.

(*e*) *Masterman* v. *Judson* (1832) 8 Bing. 224; *Davis* v. *Lovell* (1839) 4 M. & W. 678; *Lamont* v. *Crook* (1840) 6 M. & W. 615; *Crewe* v. *Field* (1896) 12 T. L. R. 405, and cases there cited.

(*f*) *Re Batson* (1894) 70 L. T. 382.

(*g*) 11 & 12 Vict. c. 42 s. 20.

Act, 1887 (*h*), be bound over by him in the same manner. If they do not duly appear their recognizances may be estreated and the penalties exacted. But any witness for the prosecution who has not been so bound over, and any witness for the defence, may be compelled to attend by means of a writ of *subpœna ad testificandum* or *subpœna duces tecum*, as the case may be, to be issued either by the Crown Office or by the clerk of the court of assize or quarter sessions where the defendant is to be tried; and for disobedience to such *subpœna* the witness will be liable to attachment (*i*).

The attendance of witnesses whose evidence is required for proceedings under the Fugitive Offenders Act, 1881 (*k*), is secured in the manner prescribed by sect. 15 of that Act.

In the County Court the attendance of witnesses, with or without documents, is enforced by summons issued without leave, and disobedience to the summons is punishable by fine which the judge may order to be applied towards the indemnification of the party thereby damnified (*l*).

The attendance of a witness who is undergoing imprisonment may in most cases be secured by a writ of *habeas corpus ad testificandum;* or, where the imprisonment is not under process in any civil action, by an order of a judge of the Supreme Court, or where the witness is required in an action in a county court, of the county court judge; or by an order of a Secretary of State (*m*).

In other cases special provisions for compelling the attendance of witnesses are made by other statutes.

(*h*) 50 & 51 Vict. c. 71, s. 5.

(*i*) Archb. Cr. Pl. 23rd ed. 1905, p. 410. Practice of the Crown Office, by Short and Mellor, Chapter XX.

(*k*) 44 & 45 Vict. c. 69.

(*l*) County Courts Act, 1883, ss. 110, 111; County Court Rules, 1903 and 1904, Order XVIII.

(*m*) Habeas Corpus Act, 1804; The Criminal Procedure Act, 1853, s. 9; Short and Mellor's Crown Office Practice, 1890, pp. 364, 365; notes to Order XXXVI r. 35, in Annual Practice; Prison Act, 1898 (61 & 62 Vict. c. 41), s. 11.

§ 2. Order of Calling Witnesses.

The party on whom the burden of proof lies, having opened his case, calls his first witness and (after the witness has duly taken the oath or affirmed) examines him in support of it. This is called the examination-in-chief and is confined to the proof of facts relevant to the issue as defined in Part II. The opposite party, if he does not intend to admit the correctness of his evidence, then cross-examines the witness with regard to any facts relevant to the issue, whether already deposed to by him in his examination-in-chief or not, and also as to any matters which, although not relevant to the issue, are relevant to the witness's credibility as hereinafter explained. At the close of the cross-examination the witness is re-examined by the party who called him, for the purpose of giving any explanation that may be requisite as to any answers made by him in cross-examination. The party then calls his next witness who is examined in like manner. When all the witnesses of the party beginning have been thus examined, his case is closed. His opponent then opens his case and calls his witnesses, who are examined in the same way, first by himself in chief, then cross-examined by his opponent and then re-examined if necessary by himself. The close of his case is ordinarily followed by his summing-up of the evidence, and then by the speech in reply of the party who began. Sometimes however the latter at the close of his opponent's evidence claims to adduce further evidence in reply to that which has been given on the other side. His right to do so depends, subject to a large discretion vested in the judge, on the following rules (*m*).

Where there are several issues, of which some lie on the plaintiff and others on the defendant, the plaintiff has the option of either confining his evidence in the first instance

(*m*) The statement in this paragraph must be read subject to the statement at pp. 39 to 42 above.

to the proof of the issues which lie on him or of offering evidence on all the issues (*n*). If he chooses the former alternative he leaves the defendant to make out, if he can, the issues which lie upon him, reserving to himself the right of calling, if necessary, evidence in reply. If on the other hand he chooses the alternative of offering evidence on all the issues, he will not ordinarily be allowed to adduce any evidence in reply, but must complete his case in the first instance (*o*).

The plaintiff, however, is generally entitled to give evidence in reply, even though all the issues are upon himself, when the case made against him is one of which he has had no notice on the pleadings, as where in an action of ejectment the defendant seeks to displace the contention of the plaintiff by an entirely new and affirmative case which he has not expressly pleaded (*p*). And in any case where a defendant does not lay a foundation for his own affirmative case by such a cross-examination of the plaintiff's witnesses as will give him fair notice of the points as to which they are going to be contradicted, the plaintiff will generally be allowed to give evidence in reply (*q*).

If the judge should call and examine a witness whom neither of the parties have called, as he is at liberty to do, the parties have no right, without leave, to cross-examine the witness on the evidence so given; but permission will generally be given to a party to cross-examine the witness as to any specific points in the witness's evidence which may be adverse to such party's case (*r*).

(*n*) *Shaw* v. *Beck* (1853) 8 Ex. 392, following *Browne* v. *Murray* (1825) Ry. & Moo. 254, and overruling *Rees* v. *Smith* (1816) 2 St. 31; and see above, p. 38.

(*o*) *Osborn* v. *Thompson* (1839) 2 Moo. & Rob. 254; *Jacobs* v. *Tarleton* (1848) 11 Q. B. 421.

(*p*) *Doe* v. *Gosley* (1839) 2 M. & Rob. 243.

(*q*) *Bigsby* v. *Dickenson* (1876) 4 Ch. D. 24; cp. *Briggs* v. *Aynsworth* (1838) 2 M. & R. 168.

(*r*) *Coulson* v. *Disborough* [1894] 2 Q. B. 316. See p. 39 above, and cf. also pp. 364, 365.

In civil and criminal cases the judge has the power to exclude all witnesses from the court (except perhaps the parties to a suit) until they have given their evidence. This is generally done upon the application of counsel in cases where it is important that the witnesses should give their own account of the transaction in question without hearing the evidence of other witnesses.

§ 3. Examination-in-Chief.

Where a witness is summoned by *subpœna duces tecum* merely to produce documents, he need not be sworn (*s*). As to witnesses who are called to give evidence, their examination is governed by the following rules.

(i) *Scope: Facts relevant to the Issue.*—The scope of examination-in-chief appears from the last two Parts of this Book. The witness must speak only as to facts relevant to the issue, and he must depose to them from his own direct personal knowledge save in the exceptional cases where hearsay evidence is admissible. The only additions to be made to this statement are these, that in certain cases a witness may give evidence in chief as to the credibility, character and conduct of the witnesses who have already given evidence on the other side, as mentioned in the next Chapter (*t*), and that the proof of documents is governed by special rules to be mentioned in Chapters IV to VII of this Part (*u*).

(ii) *Leading Questions.*—The witness must not be examined in chief by means of leading questions, that is, questions calculated to lead his mind to such answers as the party examining desires. It is presumed that a witness is to some extent biassed in favour of the party who calls him, and

(*s*) *Perry* v. *Gibson* (1834) 1 A. & E. 48; *Summer* v. *Moseley* (1834) 2 C. & M. 477; and cf. p. 320 below.

(*t*) See pp. 335—341; and cf. pp. 316—318.

(*u*) See pp. 354—406.

that this fact, coupled with the party's knowledge of what his witness is prepared to say, would afford the party an opportunity for unfairly shaping the testimony if he were allowed to frame his questions to the witness in such a form as to suggest what answer he desires to receive. The rule is however subject to some qualification, inasmuch as in some cases the reason on which it is founded fails, and in others a literal adherence to it would bring the witness's testimony to a premature close. In the first place, as to many matters not of critical importance no mischief can be done by leading, and it is therefore desirable for the saving of time that the witness should be led. These comprise matters merely formal and introductory, such as—in most cases—the witness's name, address and profession, the circumstances which led to his connection with the transaction, and generally any matters as to which there can be no dispute. Again, even upon points which are keenly contested between the parties, the mind of a witness must frequently be led by the party who calls him, to the extent of directing his attention to the particular matters sought to be inquired into (*v*); without some indication of the point on which his evidence is required a question may easily be unintelligible. Again, where a witness's independent recollection of a matter has been exhausted, the judge will often permit him to be led to the very particulars which are sought, if from the way in which he has given his evidence it appears that it can with fairness be done (*x*); the imperfection of the witness's memory generally affords a sufficient test of the true value of the testimony thus elicited.

The general effect of the rule may perhaps be summed up by saying that a party is bound not to lead his witness, in the first instance, unless it is clear that both parties regard

(*v*) *Nicholls* v. *Dowding* (1815) 1 St. 81.
(*x*) *Courteen* v. *Touse* (1837) 1 Camp. 43.

the point on which he is questioned as uncontested, since otherwise the leading of the witness will either be, or appear to be, unfair.

(iii) *Witness Adverse.*—If a witness proves on examination-in-chief to be adverse, that is merely unfavourable, to the cause of the party calling him, the party is nevertheless not entitled to cross-examine him in any respect, nor is he generally entitled to contradict him by calling other evidence inconsistent with his testimony, except in two events, namely, when the adverse evidence was unexpected or has come upon him as a surprise (*y*), and whenever he has been virtually compelled by a rule of law to call him, as in the case of an attesting witness to a document which is invalid without attestation (*z*). But he is only entitled to so contradict him indirectly, by means of other evidence of the relevant facts; he may not call evidence to prove that the witness had made some previous statement inconsistent with his present evidence (*a*).

(iv) *Witness Hostile.*—Should a witness however show himself in the course of his examination-in-chief to be hostile to the party who has called him, the latter will be permitted by the judge to cross-examine him to a limited extent (*b*). By a hostile witness is meant not one whose evidence is merely adverse, but one who shows an unfair bias against that party, and a disinclination to testify truthfully and candidly on his behalf (*c*). The extent to which the witness may be cross-

(*y*) *Ewer* v. *Ambrose* (1825) 3 B. & C. 746; *Bradley* v. *Ricardo* (1831) 8 Bing. 57; B. N. P. 297.

(*z*) *Ewer* v. *Ambrose, supra*; *Coles* v. *Coles* (1866) L. R. 1 P. & D. 70.

(*a*) *Ewer* v. *Ambrose, supra*; *Houldsworth* v. *Dartmouth* (1838) 2 M. & Rob. 153; *Melhuish* v. *Collyer* (1850) 15 Q. B. 878, 887.

(*b*) *Clarke* v. *Saffery* (1824) R. & M. 126; *Bastin* v. *Carew, ibid.* 127.

(*c*) *Greenhough* v. *Eccles* (1859) 5 C. B. N. S. 786; *Coles* v. *Coles* (1866) L. R. 1 P. & D. 70. Thus in *Price* v. *Manning* (1889) 42 Ch. D. 372, it was held that a party who called his opponent as a witness was not entitled to cross-examine him without the leave of the judge in whose discretion it was

examined in such case by the party who has called him is this, that he may be pressed by means of leading questions as to the relevant facts, and may also be interrogated as to any previous statement made by him with regard to them which is inconsistent with his present evidence. But except in so far as such cross-examination may incidentally have that effect, the party may not discredit him. He may not therefore cross-examine him to show directly that the witness is unworthy to be believed on his oath, or to show that he has given his evidence in the particular case with some corrupt or improper motive (unless perhaps where the party can show that he has been intentionally misled by the witness); in these respects the witness is still to be treated as the witness of the party who has called him (*d*).

To give still further effect to the view that a party ought not to be concluded by the evidence of his own witness when he has thus shown himself hostile, even though such cross-examination as is permitted as to the relevant facts and his previous inconsistent statements should fail to shake him, the party is also allowed to call other evidence inconsistent with that which such witness has given as to any relevant facts, although such evidence has the indirect effect of contradicting his own witness. The party is also allowed to contradict him directly by giving evidence of any previous inconsistent statement made by him, provided that the circumstances of the statement, sufficient to designate the particular occasion, have been first mentioned to the witness, and he has been asked whether or not he made it (*e*). But such previous statement is regarded, strictly speaking, as only displacing

to determine whether he had shown such hostility as to justify his being cross-examined.

(*d*) B. N. P. 297; *Ewer* v. *Ambrose* (1825) 3 B. & C. 746; *Bradley* v. *Ricardo* (1831) 8 Bing. 57; *Melhuish* v. *Collier* (1850) 15 Q. B. 878—879.

(*e*) The word "adverse" in these sections means "hostile." See *Greenhough* v. *Eccles* (1859) 5 C. B. N. S. 786.

the previous evidence of the witness, and not as being independent evidence of the facts stated in it (*f*). The practice on this subject not being absolutely settled on all points at common law, was fixed as to civil causes by sect. 22 of the Common Law Procedure Act, 1854 (*g*), and subsequently as to all proceedings by the statute 28 Vict. c. 18, of which sect. 3 is as follows:—

> A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement (*h*).

The conditions on which evidence of inconsistent statements is admissible in the cross-examination of an opponent's witness are stated in the next chapter (*i*).

It has been decided that the decision of the judge at the hearing as to the hostility of the witness is not open to review (*j*).

(v) *The Question in Issue: and Evidence of Experts.*—The party who calls a witness may not ask him the question in issue. This would be inviting him to usurp the functions of the jury; it is for the witness to state the particular facts within his knowledge and for the jury to form their general

(*f*) *Ewer* v. *Ambrose* (1825) 3 B. & C. 747; *Wright* v. *Beckett* (1834) 1 M. & R. 414, 419; *Melhuish* v. *Collier* (1850) 15 Q. B. 878—881; *Greenhough* v. *Eccles* (1859) 5 C. B. N. S. 786, 805.

(*g*) 17 & 18 Vict. c. 125 ss. 22—24, which were repealed by the Statute Law Revision Act, 1892.

(*h*) By sect. 1, it is enacted that this section shall apply to all courts of judicature, as well criminal as all others.

(*i*) See pp. 322, 325.

(*j*) *Rice* v. *Howard* (1886) 16 Q. B. D. 681; *Price* v. *Manning* (1889) 42 Ch. D. 372.

conclusion from them. Thus in an action for goods sold and delivered, where the defendant pleaded in abatement that the debt was due from himself and another person jointly, the plaintiff was not allowed to ask his witness, who was called to prove the giving of the order by the defendant, the question "With whom did you deal?" (*k*). And in an action against a trader for passing off his goods as the plaintiff's, Lord Macnaghten declared it improper to ask witnesses whether a person going into a shop as a customer would be likely to be deceived (*l*).

The only exception to this rule is in the case of experts, who for this purpose are regarded as exercising a function something between that of ordinary witnesses and that of assessors to the jury, and may be asked their opinion although it involves a general conclusion upon a question in issue (*m*). Where an expert has direct personal knowledge of the particular circumstances of the case as to which he is called to testify, as where a medical man is summoned to give evidence as to the state of health of his own patient, he is entitled to give his opinion as based on the facts as they have been observed by himself; but where he is dependent for his knowledge of the facts upon the testimony of other witnesses, he cannot express his opinion thus absolutely (*n*); the facts must then be presented to him in the form of an hypothesis, and he may be asked by each party in turn what, assuming a certain state of things to exist or such and such witness's evidence to be true, would be his opinion with regard to the matter (*o*).

(*k*) *Bonfield* v. *Smith* (1844) 12 M. & W. 405.

(*l*) *Payton & Co.* v. *Snelling, Lampard & Co.* [1901] A. C. 308, 311.

(*m*) *Beckwith* v. *Sidebotham* (1807) 1 Camp. 116.

(*n*) *R.* v. *McNaughten* (1843) 1 C. & K. 130, note (*a*), 135; *R.* v. *Searle* (1831) 1 Moo. & Rob. 75; cf. Wills on Circumstantial Evidence, 5th ed. 1902, pp. 139—141.

(*o*) *R.* v. *Wright* (1821) R. & R. 456; *Malton* v. *Nesbitt* (1824) 1 C. & P. 70, 72; *Fenwick* v. *Bell* (1844) 1 C. & K. 312.

§ 4. Cross-examination.

A witness who is merely summoned to produce a document and is not sworn (*p*) cannot be cross-examined; and the same rule holds good where such person is sworn by mistake and the mistake is discovered before he has given any evidence in support of the case of the party calling him (*q*).

As to witnesses who are examined in chief, the following rules apply to their cross-examination.

From the point of view of advocacy the object of cross-examination may be stated to be to elicit from the witness facts relevant to the issue favourable to the case of the cross-examining party and within the knowledge of the witness, though he has not proved them in examination in chief; to obtain admissions from the witness which have the effect of qualifying or explaining statements he has made in chief, thereby giving them what the cross-examiner conceives to be their true complexion; and further, if the facts warrant that course, to contradict the statements the witness has made by reference to other facts or written statements which he is bound to admit, and so throw discredit upon his memory or veracity generally. By these means the cross-examining party indicates to the court the case set up by himself, and as far as possible obtains evidence in support of it from his opponent's witnesses. From the point of view of the law of evidence it may be said that the matters as to which cross-examination may be addressed may be divided into facts relevant to the issue and facts affecting the credibility of the witness, though in practice it is not always easy to draw a sharp line between the two, as they must often be inextricably blended

(*p*) See p. 314 above.

(*q*) *Rush* v. *Smith* (1834) 1 C. M. & R. 94; *Wood* v. *Mackinson* (1840) 2 M. & R. 273.

in the cross-examiner's questions. A defendant may cross-examine not only his opponent (and his witnesses), but also his co-defendant, if the evidence given by the latter should be adverse to him, and this whether the proceeding be civil (*t*) or criminal (*u*).

(i) *Facts relevant to the Issue.*—Cross-examination as to the relevant facts is not confined to the matters which were proved or referred to in the examination-in-chief, but may range over any matters whatever material to the case. Thus if a secretary of a company is called merely to prove a formal document, such as a contract or a minute of the company, he may be cross-examined as to the whole history and affairs of the company in so far as they are relevant to the transactions in question. And so with any other witness who is called to prove any material fact in the case; he may be cross-examined as to any facts which are material to the cross-examining party's case, although in chief he has been asked no questions as to them. But for the purpose of proving the issue no facts that are not relevant to it may, in strictness, be inquired into by the cross-examining party; and in this connection it is also important to bear in mind a rule that is not unfrequently overlooked, namely, that no relevant fact may be proved by a witness in cross-examination otherwise than by the ordinary media of proof. Thus, for instance, questions as to character and as to conduct on other occasions are not generally relevant to the issue (*v*). Again, if a witness is asked in cross-examination whether he did not hear A, a stranger, make in the absence of the parties some statement about a certain relevant fact, since his answer in the affirmative would not be evidence upon the issue, the question should be disallowed (*w*). In like manner it is a general rule that a

(*t*) *Allen* v. *Allen* [1894] P. 248, 254.
(*u*) *R.* v. *Hadwen* [1902] 1 K. B. 882.
(*v*) See Chapters II and III of Part II.
(*w*) As to admissions of hearsay statements by a party, see p. 158.

witness cannot be cross-examined as to the contents of a document relevant to the issue, unless the document is first produced to him and proved in accordance with the general rule as to the adduction of documents to be mentioned in Chapter IV (*x*). Such questions are no doubt often asked and pass without objection, but the witness has a right to refuse to answer them until the document is shown or read to him, and the strict rule would appear to be that such questions cannot be put, though upon this there has been some difference of judicial opinion (*y*). But this rule is subject to two exceptions. First, where the witness is himself a party to the proceeding, if he thinks fit to answer as to the contents of the document without first demanding its production, his answer will be admissible (*y*). Secondly, where the witness had made a previous statement in writing inconsistent with his present testimony, he may be asked as to its contents without its being produced to him, unless it is intended to contradict his answer (*z*).

Many questions however which for the reasons aforesaid would be inadmissible, if directed solely to the proof of the issue, are legitimate as cross-examination to the witness's credit; the scope of the latter must therefore also be borne in mind in considering whether a given question is open to objection.

(ii) *Cross-examination to Credit.*—A witness may be cross-examined not only as to the relevant facts but also as to all facts which reasonably tend to affect the credibility of his testimony. This is generally spoken of as cross-examination to credit, inasmuch as a large part at any rate of the facts which are relied on for this purpose are facts which touch

(*x*) *The Queen's Case* (1820) 2 B. & B. 286; *Macdonnell* v. *Evans* (1852) 11 C. B. 930; *Darby* v. *Ouseley* (1856) 1 H. & N. 1.

(*y*) *Henman* v. *Lister* (1862) 31 L. J. C. P. 366. And cf. p. 158 above.

(*z*) See below, pp. 339, 340, where the section enacting this is set out in full; and cf. p. 325.

the credit and good fame of the witness. But this term is perhaps somewhat misleading as suggesting that any cross-examination is permissible which tends in any way whatever to disparage the character of the witness, whereas no such cross-examination can be legitimate unless it has some reasonable bearing on his credibility, that is to say, his means of knowledge, or the accuracy of his memory, or his truthfulness. For instance in an action for goods sold and delivered, where the defendant imputes to the plaintiff some dishonest trick or overcharge, it would not ordinarily be legitimate for the defendant to cross-examine the plaintiff to show that he is not married to the woman with whom he lives and who passes as his wife, since that fact, taken by itself, has no bearing on his honesty in trade; nor to cross-examine him to show that twenty years ago he was convicted when a school-boy for stealing apples, since that, if it stands alone, is too remote to be taken into consideration by any fair man in judging of his honesty now. The Court of Appeal has held, in a case where soap manufacturers sought to restrain the infringement of a trade-mark and the selling of goods made up so as to imitate the plaintiffs' goods and deceive the public, that it was irrelevant to any issue in the case to ask the plaintiffs in cross-examination whether they had advertised their goods as patented and whether they had any such patent, and that the judge below was right to refuse to allow any such questions to be put (*a*). So it is not permissible to cross-examine a witness as to his religious belief merely for the purpose of discrediting him (*b*). Nor as to what judges have said of his testimony in other trials upon other matters; in the case of *Seaman* v. *Netherclift* the late Lord Justice Bramwell said, "There can

(*a*) *Lever & Co.* v. *Goodwin Brothers*, W. N. (1887) 107; cf. also *Tennant* v. *Hamilton* (1839) 7 Cl. & F. 122, for a question which was disallowed as inadmissible in cross-examination as leading to a collateral inquiry, and could not affect the issue or test the credit of the witness.

(*b*) See per Pollock C. B. in *Darby* v. *Ouseley* (1856) 25 L. J. Ex. at p. 232; *S. C.* 1 H. & N. 1.

be no doubt that the question put by the cross-examining counsel ought not to have been allowed: 'Have you read what Sir James Hannen is reported to have said as to your evidence in *Davies* v. *May*?' What Sir James Hannen had said in a former case was not evidence. It was therefore an improper question, and the answer to it, if untrue, would not have subjected the witness to an indictment for perjury" (*c*).

On the other hand recent acts of dishonesty or untruthfulness in business matters, or a series of such acts extending over a considerable period, would generally be fair subject of cross-examination in such a case as that put above.

It must obviously be often a difficult question of degree to determine what facts may fairly be cross-examined to as bearing upon the credibility of the witness, and the presiding judge must necessarily rely much on the character and experience of the counsel by whom the cross-examination is conducted. The only written rule of procedure upon this subject is contained in Rule 38 of Order XXXVI, which is as follows:—

> The judge may in all cases disallow any question put in cross-examination of any party or other witness which may appear to him to be vexatious and not relevant to any matter proper to be inquired into in the cause or matter.

By the common law a witness could be cross-examined as to whether he had been convicted of felony or misdemeanour; and this right is now confirmed by statute (*d*); but it is submitted that this must always be subject to this, that the circumstances and character of the conviction must have some bearing on the witness's credibility.

As in cross-examining his opponent's witnesses to their credit a party is not confined to the relevant facts, he may cross-examine as to matters and conduct disconnected with the action, and as to statements made by the witness to others

(*c*) *Seaman* v. *Netherclift* (1876) 2 C. P. D. 53, at p. 59.
(*d*) 28 Vict. c. 18 s. 6. See pp. 340, 341.

or by others to him or in his hearing; in short, as to any facts whatsoever, provided always that they have a reasonable bearing on the credibility of the witness in the proceeding in which he has been called to give evidence. Also, with a view of testing the witness's credit, he may be cross-examined as to the contents of documents which are not produced and shown to him, though it seems that he is not compellable to answer such questions, and may demand that the documents shall be first produced and shown to him (*e*).

But the right to cross-examine to credit is subject to this rule, that with a few exceptions, the answers of the witness as to matters not relevant to the issue are conclusive, in this sense, that they cannot be contradicted by evidence in chief on the other side (*f*). However untrue they may be, they cannot be treated as if their truth or falsity were an issue in the cause. The only exceptions to this rule are these, that by the common law a party may give evidence in chief, after due cross-examination of his opponent and his witnesses, to show (a) that they are notorious liars, or (b) that they have given their testimony from corrupt or indirect motives, or (c) that they have made previous inconsistent statements with regard to the relevant facts. To these a fourth exception has been added by statute, enabling a party to prove (d) that his opponent or his witness has been convicted of an indictable offence, if upon cross-examination he has denied the fact (*ff*). This general rule excluding evidence to contradict a witness on matters not relevant to the issue, as well as the exceptions to it, are based on these considerations, that a witness cannot justly be expected to come into court prepared with evidence as to every act and incident of his life (which would be necessary if evidence could be given against him thereon), and that it would indefinitely prolong the trial to allow evidence to be given on both sides as to such collateral matters; but that on

(*e*) *Henman* v. *Lester* (1826) 31 L. J. C. P. 366. See pp. 339, 340 and 325.

(*f*) *Baker* v. *Baker* (1863) 32 L. J. P. D. & A. 145.

(*ff*) For these four exceptions, see next Chapter, pp. 335—341.

the other hand a witness ought to come prepared to support his general reputation for truthfulness, to prove the purity and integrity of his motives in coming to give evidence, and to show, if it be the fact, that he has never made previous statements inconsistent with his testimony, and has never been convicted (*g*).

These four exceptions are considered separately in the next Chapter (*gg*).

(iii) *Leading Questions.*—In cross-examination the witness may be examined by means of leading questions, for the presumption is that he is biassed against the cross-examining party, and will not be tempted to follow his lead. It has even been held that this rule applies where the witness is an unwilling witness for the party calling him (*h*). But this must be taken with some qualification, for if it should appear in the course of the examination that the witness is biassed against the party who called him and desirous of assisting his opponent, it would at once become unfair for the latter to suggest to the witness the answers which he should give (*i*). If on the other hand the witness betrays a zeal against the cross-examining party or shows an unwillingness to speak fairly and impartially, he may be questioned with minuteness as to particular facts or even particular expressions; there can be no danger in leading too much where the witness is obstinately determined not to follow (*k*).

§ 5. Re-examination.

A party is bound in the re-examination of his own witness still to observe, as in his examination-in-chief, the rules which prohibit leading questions and questions as to the issue itself.

(*g*) *Att.-Gen.* v. *Hitchcock* (1847) 1 Ex. 91.
(*gg*) See pp. 335—341.
(*h*) *Parkin* v. *Moon* (1835) 7 C. & P. 408.
(*i*) *R.* v. *Hardy* (1794) 24 How. St. Tr. 199, at p. 659.
(*k*) Phillips on Ev. 10th ed. 1852, p. 472.

The scope of the re-examination of a witness is determined by the scope of the cross-examination to which he has been subjected. It is in the nature of a reply to the cross-examination, being intended, from the point of view of advocacy, to displace the effect of the cross-examination, so far as the facts will warrant this being done. A party may therefore, in re-examining his witness, ask him all questions necessary to draw forth an explanation of the full meaning of expressions used by him in cross-examination, if they are in themselves doubtful, and also of the motives by which he was induced to make use of them; but he is not entitled to introduce any new matter which does not serve to explain such expressions and motives (*l*). Thus where on an indictment for murder the prosecution called witnesses whose names were on the back of the indictment solely in order to give the prisoner the opportunity of putting questions to them, and the prisoner by his cross-examination elicited many facts in his own favour, it was held that the prosecution could not re-examine to any matters not referred to in such cross-examination (*m*). So where a witness for the plaintiff had been cross-examined by the defendant as to certain admissions made by the plaintiff on his examination as a witness in a former proceeding, and the plaintiff's counsel sought to ask him in re-examination whether the plaintiff had not also in the course of the same examination made other statements not relating to the same point, but which told in favour of his present contention, it was held that the question could not be put, because proof in cross-examination of a detached statement made by the party at a former time does not authorize re-examination as to all that he said at the same time, but only as to so much as can be in some way connected with the statement proved (*n*). Whether the witness is a party to the proceeding or not, his

(*l*) *Queen's Case* (1820) 2 B. & B. 296, 297.
(*m*) *R.* v. *Beezley* (1830) 4 C. & P. 220.
(*n*) *Prince* v. *Samo* (1838) 7 A. & E. 627.

re-examination as to previous statements as to which he has been cross-examined is governed by a like rule to that already mentioned in the chapter on admissions, that a party against whom an admission is given in evidence is entitled to have the whole of it presented to the jury, and not merely a part (*o*). The explanations of the witness in re-examination may of course relate not only to statements made in cross-examination as to the relevant facts but also as to those affecting the witness's credit, as for instance to show what provocation he had received for making use of a vindictive expression which he has admitted having uttered (*p*).

If in cross-examination a document has been handed to a witness merely for the purpose of his identifying it or proving the signature, no questions having been asked as to its contents, the document is not thereby made evidence, and there is consequently no right to ask questions as to its contents in re-examination (*q*).

Whenever any part of a witness's evidence-in-chief is not directly or indirectly challenged in cross-examination, there is of course no occasion nor any right to re-examine thereon (*r*).

§ 6. Refreshing Memory of Witness.

Although a witness is generally prohibited, as stated in Part II (*s*), from proving facts by evidence of his own previous statements made out of court, he is allowed, where the previous statement is a written one, to do what in effect is nearly the same thing by another rule which permits him to refresh his memory of facts formerly within his knowledge by means of any memorandum of them made by himself at

(*o*) See above, pp. 159—161.

(*p*) *R.* v. *St. George* (1840) 9 C. & P. 483, 488.

(*q*) *Cope* v. *Thames Haven Dock Co.* (1848) 2 C. & K. 757; *Collier* v. *Nokes* (1849) *ibid.* 1012.

(*r*) See also pp. 342, 343, as to corroborative evidence in such case.

(*s*) Chapter I, § 3, pp. 142 *seq.*

or about the time of their occurrence (*t*). Thus it is every-day practice for a doctor to refer to his notes of a case he has attended, a policeman to notes of statements or conversations and other facts recorded by him at or about the time they occurred, and for cashiers and accountants to refer to their account books for details of the transactions to which they testify.

It is not essential that the memorandum should have been made contemporaneously with the transaction, nor is any particular limit of time prescribed; it is only necessary that it should have been made at a time when the witness's recollection of it was still clear and distinct (*u*). Nor is it essential that the witness upon inspection of the memorandum, should have any independent recollection as to the facts referred to in it, provided he is able to say that the facts it records are true. Thus where the plaintiff called a witness to prove a payment made by himself to the witness some five years before, but of which the latter had no recollection, he put into the witness's hands a cash-book of his own containing an entry of the payment in question which purported to be initialled by the witness. The latter on inspecting the book said:—

> The entry of £20 in the plaintiff's book has my initials written at the time. I have no recollection that I received the money; I know nothing but by the book; but seeing my initials, I have no doubt that I received the money (*x*).

It was held that this was good proof of the payment. So too a witness was allowed to prove the letting of a house, by referring to an entry made by himself in a memorandum book containing the terms of the letting, although he had no memory of it but from the book, and would not have been

(*t*) *Whitfield* v. *Aland* (1849) 2 C. & K. 1015; *Talbot* v. *Cusack* (1864) 17 Ir. C. L. R. 213.

(*u*) *Wood* v. *Cooper* (1845) 1 C. & K. 645, 646.

(*x*) *Maugham* v. *Hubbard* (1828) 8 B. & C. 14.

able of his own knowledge to speak to the fact, but on reading the entry had no doubt that the letting took place as stated (*y*).

The ordinary mode of refreshing the witness's memory is to cause him to inspect the memorandum in the witness-box. But if it should appear that he is blind (*z*), or too infirm to inspect it himself (*a*), it may be read to him. The rule applies no less on cross-examination than when the witness is being examined in chief (*b*); but there is this difference to be noted, that whereas in examination-in-chief there is probably no other ground on which the document may be used, the witness might be referred to it in cross-examination in order to test his recollection, even though it should not fulfil the conditions of a memorandum by which the witness's memory may be refreshed (*c*).

The memorandum, which a witness uses to refresh his memory, need not itself be admissible evidence; nor does his referring to it make it evidence. Hence a document which is inadmissible for want of a stamp may still be used for the purpose of refreshing the memory (*d*).

So, too, in an action by lessor for breaches of a farming agreement, which had been made by the plaintiff's steward reading out from a printed paper the terms of the proposed tenancy, to which the tenant had assented; the plaintiff's steward, being called as a witness, was allowed to refresh his memory as to the terms of the letting, although the printed paper was held not to constitute an agreement of tenancy (*e*).

(*y*) *R.* v. *St. Martin's* (1834) 2 A. & E. 210.

(*z*) *Catt* v. *Howard* (1820) 3 St. 3.

(*a*) *Vaughan* v. *Martin* (1796) 2 Esp. 439.

(*b*) *R.* v. *Ramsden* (1827) 2 C. & P. 603; *R.* v. *Duncombe* (1838) 8 C. & P. 369.

(*c*) *Whitfield* v. *Aland* (1849) 2 C. & K. 1015.

(*d*) *Maugham* v. *Hubbard* (1828) 8 B. & C. 14; *Gregory* v. *Tavernor* (1833) 6 C. & P. 280, 281. See next page, note (*f*).

(*e*) *Bolton* v. *Tomlin* (1836) 5 A. & E. 856.

Even under the Stamp Act, 1891 (*e*), it seems to have been decided that an insufficiently stamped promissory note may be put into the hands of a witness to refresh his memory in cross-examination (*f*).

But the opposite party is always entitled to inspect the memorandum in order to check the use made of it, and, if necessary, to examine the witness as to the time at which it was made or on any other point which may arise out of the use to which it is being put; and the judge and jury have a like right of inspection (*g*). If however the opposite counsel on thus inspecting it should refer to other entries or parts of the document, which have not been used to refresh the witness's memory, he will make them evidence against himself on the general principle by which either party who calls for and inspects a document in possession of the other side is bound to put it in (*h*). And conversely, it has been held, where the document produced no impression on the witness's memory, that inasmuch as it had wholly failed of its purpose, the opposite side was not entitled to inspect it (*i*).

The term "memorandum" denotes the use to which the document is put, and does not import that the rule is confined to documents of any particular form. It is applicable, as the cases show, to the ordinary books of account kept by business men, depositions, a ship's log-book, and in fine to any form of writing which fulfils the term of the rule. Nor is it necessary that the memorandum should be in the witness's own handwriting, if it was made under his personal observation or recognised by him as a correct statement at a time when the facts were fresh in his memory. Thus where a trades-

(*e*) 54 & 55 Vict. c. 39.

(*f*) *Birchall* v. *Bullough* [1896] 1 Q. B. 325, but *quære*, whether this was well decided. Cf. p. 392.

(*g*) *Sinclair* v. *Stephenson* (1824) 1 C. & P. 582; *R.* v. *Ramsden* (1827) 2 C. & P. 603; *Gregory* v. *Tavernor* (1833) 6 C. & P. 280.

(*h*) *Gregory* v. *Tavernor* (last note); see below, pp. 360, 361.

(*i*) *R.* v. *Duncombe* (1838) 8 C. & P. 369.

man's clerk entered his master's business transactions as they occurred into a waste-book from his own knowledge, and the tradesman copied the entries day by day into a ledger in the presence of the clerk who checked them as they were copied, it was held that the latter, when called as a witness to prove certain of the transactions, was entitled to inspect the entries in the ledger as equivalent to duplicate memoranda made by himself (*k*). So, where a witness was called to give an account of a voyage, he was held entitled to refresh his memory by entries in the log-book, although not made by himself, on his proving that he had from time to time examined the entries in it while the events recorded were fresh in his recollection, and had always found them accurate (*l*). In like manner where the document is not a subsequent record at all, but forms a written scheme, so to speak, in accordance with which the transaction is executed, it may be used in like manner as a memorandum. In such cases the transaction is made to follow and agree with the document, as in the case of an ordinary memorandum the document follows and reflects the transaction. Thus where the transaction to be proved consisted of the payment of certain sums of money to a number of workpeople, the witness who made the payments was allowed to refresh his memory by the inspection of a book in which the amounts of the wages which were to be paid had been set out, on his proving that he had had the book before him and checked each payment as he made it (*m*). So in an action for goods sold and delivered the plaintiff's clerk was allowed to prove the debt in the following way: he had not himself supplied the goods to the defendant nor entered them in his master's books, but on a certain occasion he went to the defendant and examined the

(*k*) *Burton* v. *Plummer* (1834) 2 A. & E. 341.
(*l*) *Burrough* v. *Martin* (1809) 2 Camp. 112.
(*m*) *R.* v. *Langton* (1877) 2 Q. B. D. 297.

book with him, article by article, sometimes the defendant and sometimes the clerk calling over the several articles, while the defendant admitted their receipt and the correctness of the amount charged for each of them in turn. It was held that the clerk was entitled to prove the debt by means of the defendant's admissions, and that as to these he was entitled to refresh his memory by reference to the book (*n*).

If a memorandum evokes no independent recollection of the transaction in a witness's mind, he is not entitled to prompt himself with it so as to be able to give evidence, unless he also brings the document itself into court (*o*). The only exception to this is where the original is lost, and the witness produces a copy which he can prove to be accurate (*p*). But for convenience' sake a witness who has his original notes in court has been allowed by the judge to refresh his memory by means of a printed copy of a report which was in all material respects a transcript from them (*q*). But where the original might have been produced it will not suffice to have in court either a copy (*r*) or extracts from it (*s*). On the other hand, where the memorandum, whenever used and whether an original or not, has evoked an independent recollection in the witness's mind, the production of the original in court is not essential to the admissibility of the evidence (*t*).

By analogy to the foregoing cases expert witnesses are allowed to refresh their memory by reference to treatises and tables which they are in the habit of consulting. But as

(*n*) *Jacob* v. *Lindsay* (1801) 1 East, 460.

(*o*) *Howard* v. *Canfield* (1836) 5 Dowl. 417; *Beech* v. *Jones* (1848) 5 C. B. 696.

(*p*) *Topham* v. *McGregor* (1844) 1 C. & K. 320; *Talbot* v. *Cusack* (1864) 17 Ir. C. L. R. 213.

(*q*) *Horne* v. *Mackenzie* (1839) 6 Cl. & F. 628.

(*r*) *Jones* v. *Stroud* (1825) 2 C. & P. 196.

(*s*) *Doe* v. *Perkins* (1790) 3 T. R. 749.

(*t*) *Tanner* v. *Taylor* (1790) 3 T. R. 754; *Beech* v. *Jones* (1848) 5 C. B. 696.

such treatises do not thus become themselves evidence, a witness is not entitled to read aloud from them, but must embody the result in his own words and give evidence on the matter upon his own responsibility (*u*).

(*u*) *Collier* v. *Simpson* (1831) 5 C. & P. 73; *Sussex Peerage* (1844) 11 Cl. & F. 85, 114, 117; *Cocks* v. *Purday* (1846) 2 C. & K. 269; *Rowley* v. *L. & N. W. Rail. Co.* (1873) L. R. 8 Ex. 221.

CHAPTER II.

EVIDENCE TO DISCREDIT.

§ 1. *Opponent's Witness not to be believed on his Oath.*
§ 2. *His Evidence Corrupt.*
§ 3. *His Evidence Inconsistent with Previous Statement.*
§ 4. *His Conviction for an Indictable Offence.*

It was stated in the last Chapter that when a party cross-examines his opponent's witness as to facts not relevant to the issue but only relevant to the witness's credibility, he is not entitled, as a general rule, if the witness denies the discrediting facts, to call evidence in chief to contradict him; but that to this general rule certain exceptions are admitted, namely, where a witness is charged (i) with being a notorious liar, (ii) with having been actuated by corrupt motives in giving his evidence or (iii) with having given evidence inconsistent with some previous statement he has made about the relevant facts; to which exceptions another has been added by statute, namely, (iv) where the witness is charged with having committed some indictable offence (*a*).

Evidence in chief with regard to facts of this description is sometimes spoken of as if it were in a sense relevant to the issue (*b*). If by this it is merely meant that such evidence, when believed, has the effect of displacing the testimony of the witness who is thereby discredited, it may

(*a*) Above, p. 325.

(*b*) *Queen's Case* (1820) 2 B. & B. 312; *Att.-Gen.* v. *Hitchcock* (1847) 1 Ex. 91.

be observed that the same is often true of answers extorted in cross-examination as to facts which do not fall under any of these heads and which are undoubtedly relevant only to the witness's credibility. On the other hand it is clear that these facts as to which the witness may be contradicted are not in any sense a part of the res gestæ or relevant facts in the ordinary sense. It may be doubted therefore whether expressions of this kind must not be taken merely as another way of stating that they are matters as to which the law allows evidence in chief to be given (*c*). Inasmuch as they are clearly only ancillary to cross-examination to credit, being indeed inadmissible without it (*d*), this appears to be the most convenient place in which to speak of them.

§ 1. Opponent's Witness not to be believed on his Oath.

A party may call witnesses to say that in their opinion a witness who has testified on the other side is not to be believed on his oath. Where two men were indicted for conspiring to commit an assault, and at the close of the case for the prosecution the Court of Quarter Sessions refused to admit the evidence of witnesses tendered on behalf of the defendants to prove that they would not believe the witnesses for the prosecution on their oaths, the Court for Crown Cases Reserved quashed the conviction, and observed that the practice was so ancient and hitherto so undoubted that it could not be altered unless by the authority of the legislature (*e*). The witnesses who give this evidence must not testify as to particular acts of criminality or misconduct, but must confine their evidence to the general character and reputation in

(*c*) See *Att.-Gen.* v. *Hitchcock* (1847) 1 Ex. 91, at pp. 99, 100.

(*d*) *Queen's Case* (1820) 2 B. & B. 312, 313; *Carpenter* v. *Wall* (1840) 11 A. & E. 803.

(*e*) *R.* v. *Brown* (1867) L. R. 1 C. C. R. 70.

point of veracity of the witness (*f*), and must speak from their own personal knowledge upon the matter (*g*). And they are of course liable to cross-examination both as to the immediate subject of their evidence and as to their own credit.

§ 2. Evidence of Opponent's Witness Corrupt.

A party may call evidence to show that a witness on the other side has given his evidence in the particular case from some corrupt or indirect motive, as bribery, malice or revenge; or has given it under the influence of some bias in favour of, or against, one of the parties whereby suspicion is cast on the honesty of his evidence.

Thus it has been decided that evidence may be called to prove that a witness has accepted a bribe, or has offered to bribe others to give evidence (*h*), but not that he has been offered a bribe, as this is of no importance if the bribe was not accepted; in the words of Pollock C. B. "It is no disparagement to a man that a bribe is offered to him; it may be a disparagement to the person who makes the offer" (*i*). But a mere attempt by a witness to dissuade another from giving evidence on the other side does not come within the rule (*k*).

Again in an action upon a promissory note the execution of which was in dispute, the defendant's case being that the note was forged, the principal witness for the plaintiff was a female servant of the plaintiff who denied in cross-examination that she was the kept mistress of the plaintiff. Evidence

(*f*) *R.* v. *Rudge* (1805) Pea. Add. Ca. 232; *Sharpe* v. *Scoging* (1817) Holt, N. P. C. 541.

(*g*) *Ibid.*; and *Mawson* v. *Hartsink* (1802) 4 Esp. 102.

(*h*) *Lord Stafford's Case* (1680) 7 How. St. Tr. 1400.

(*i*) *Att.-Gen.* v. *Hitchcock* (1847) 1 Ex. 91, 103.

(*k*) *Harris* v. *Tippett* (1811) 2 Camp. 637.

tendered by the defendant to prove this fact was admitted by Coleridge J. (*l*).

The rule is well illustrated by the case of *R.* v. *Yewins* (*m*). There the prisoner was indicted for stealing wheat; the principal witness against him was a boy of the name of Thomas, his apprentice; the defendant's counsel asked Thomas in cross-examination, (a) whether he had not been charged with robbing his master, and (b) whether he had not afterwards said he would be revenged on him and would soon fix him in Monmouth Gaol. He denied both. The defendant's counsel then proposed to prove, (a) that he had been charged with robbing his master, and (b) that he had spoken the words imputed to him. Lawrence, J., ruled that the witness's answer must be taken as to the former, but that the defendant might call evidence to prove that he had uttered the words imputed to him.

§ 3. Evidence of Opponent's Witness inconsistent with previous Statement.

It is a rule of the common law that evidence may be given to show that a witness, though not a party to the proceedings, has on some previous occasion made some statement concerning relevant facts inconsistent with his present testimony, if upon cross-examination he denies such previous statement (*n*). If the witness were a party the evidence would be admissible on another ground, since the relevant facts may always be established through the medium of an admission

(*l*) *Thomas* v. *David* (1836) 7 C. & P. 350. In this case the witnesses were ordered out of court, and the suggestion of the defendant, for whom the verdict was given, probably was that the plaintiff's witness was conspiring with him to support a forgery.

(*m*) *Circa* 1811, 2 Camp. 638.

(*n*) *Crowley* v. *Page* (1837) 7 C. & P. 789; *Andrews* v. *Askey* (1837) 8 C. & P. 7; *Att.-Gen.* v. *Hitchcock* (1847) 1 Ex. 91.

proved to have been made by the opposite party, even though he has not been called as a witness and cross-examined to it; but previous statements of a witness who is not a party cannot be proved except under the present head of evidence. Doubts having arisen whether such evidence could also be given where the witness neither denied nor distinctly admitted that he had made such previous statements, it was provided by statute that in such case also like evidence might be given. This was first enacted in respect of civil cases only by section 23 of the Common Law Procedure Act, 1854 (*o*), and afterwards with regard to both civil and criminal cases by the Statute 28 Vict. c. 18, of which section 4 is as follows:—

> If a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding (*q*) and inconsistent with his present testimony does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

At common law it was also held not only that a witness could not be cross-examined as to the contents of a previous written statement unless the document was first shown to him and he admitted it to be in his handwriting, but also that, once that admission made, the party cross-examining was entitled to put it in evidence to contradict him, although the witness might not have had any opportunity of explaining it (*r*). This state of the law was amended first as to civil cases by the Common Law Procedure Act, 1854 (*s*), and afterwards

(*o*) 17 & 18 Vict. c. 125. These sections were repealed by the Statute Law Revision Act, 1892.

(*q*) By sect. 1 this section applies to all courts of judicature as well criminal as all others.

(*r*) *Queen's Case* (1820) 2 B. & B. 286; cf. p. 322.

(*s*) 17 & 18 Vict. c. 125 s. 24, repealed by the Statute Law Revision Act, 1892.

with regard to both civil and criminal cases by the Statute 28 Vict. c. 18, of which section 5 is as follows:—

A witness may be cross-examined as to previous statements, made by him in writing, or reduced into writing, relative to the subject-matter of the indictment or proceeding (*s*), without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit.

§ 4. Conviction of the Opponent's Witness for an Indictable Offence.

At the common law a witness might be cross-examined as to whether he had been convicted of any felony or misdemeanour, but if he denied it he could not be contradicted, unless the commission of the offence was relevant to the issue. This state of the law was altered as to civil causes by sect. 25 of the Common Law Procedure Act, 1854 (*t*), and afterwards as to both civil and criminal cases by the Statute 28 Vict. c. 18, of which sect. 6 enacts as follows:—

A witness may be questioned as to whether he has been convicted of any felony or misdemeanour, and, upon being so questioned, if he either denies or does not admit the fact or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was convicted or by the deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken) shall, upon proof of the identity of the person, be sufficient evidence of the said convic-

(*s*) By section 1, this section applies to all courts of judicature as well criminal as all others.

(*t*) 17 & 18 Vict. c. 125, repealed by Statute Law Revision Act, 1892.

tion without proof of the signature or official character of the person appearing to have signed the same.

This case differs from the others mentioned in this Chapter in this, that a witness's conviction for a felony or misdemeanour was not considered necessarily relevant to the issue; whereas the effect of the statute is now to admit evidence of the conviction in all cases where it is admissible to cross-examine the witness to his credit with regard to it (*u*).

(*u*) *Ward* v. *Sinfield* (1880) 49 L. J. C. P. 696.

CHAPTER III.

CORROBORATIVE EVIDENCE.

§ 1. *Corroboration required by Prudence.*
§ 2. *Corroboration required by Law.*

THIS head of evidence does not fall very symmetrically under any of the titles into which this work is divided, since it is concerned solely with the quantity of testimony relating to the relevant facts which may or must be adduced in order to produce belief concerning a fact in issue. As however it is intimately connected with the credibility of witnesses, this is perhaps on the whole the fittest place to interpose it, following the subject of Evidence to Discredit.

The ancient maxims of the civil and canon law, *testis unus testis nullus* and *unus testis non est audiendus* have fortunately not prevailed in this country. Our law recognises that, inasmuch as the story told by one witness may be uncontradicted and may be corroborated by a crowd of circumstances, while that of many witnesses may be extravagant and wholly incredible, judicial decisions should proceed on the intelligence and credit, and not on the number, of the witnesses examined or the documents produced in court: *testimonia ponderanda sunt, non numeranda* (*a*).

When a witness who is called to give evidence to some relevant fact is not cross-examined with regard to it, the

(*a*) Wills on Circumstantial Evidence, 5th ed. 1902, p. 30; Best on Evidence, 9th ed. Bk. 3, Pt. 2, Ch. X.

party for whom he is called is ordinarily entitled, unless the omission is clearly due to an oversight or his opponent has indicated that he intends to challenge the evidence in some other way, to assume that the evidence is not questioned; and in such case corroborative evidence is superfluous and on that ground improper. If on the other hand the evidence is questioned by cross-examination, it at once becomes permissible to corroborate it by further evidence. The application of this rule is so familiar that it requires no illustration.

Experience however has shown that in some classes of cases there is a special danger in relying on the testimony of a single witness uncorroborated, even though he be uncontradicted, and hence in certain cases it is a generally observed practice of the courts to require corroborative evidence and to direct juries that it is not safe to act without it; and in certain other cases corroboration is made essential either by a rule of the common law or by statute.

§ 1. Corroboration required by Prudence.

In the following cases corroborative evidence, though not essential in law, is in practice considered indispensable, unless the evidence of the single witness, uncorroborated, carries the clearest conviction to the mind of the judge or jury trying the issues of fact in the case.

(i) *Accomplices.*—In criminal cases accomplices of the prisoner have always been competent witnesses (*b*), though the fact that they are accomplices, either as principals or accessories, detracts greatly from their credit as witnesses; and hence it has been the practice that their evidence should be corroborated by other testimony. The practice of the

(*b*) See above, pp. 127, 135.

courts in this respect was clearly stated in the leading case of *R.* v. *Stubbs* (*c*) as follows :—

Jervis, C. J.—. . . It is not a rule of law that an accomplice must be confirmed in order to render a conviction valid; and it is the duty of the judge to tell the jury that they may, if they please, act on the unconfirmed testimony of an accomplice. It is a rule of practice, and that only, and it is usual in practice for the judge to advise the jury not to convict on the testimony of an accomplice alone, and juries generally attend to the direction of the judge, and require confirmation. There is a further point in this case. Where an accomplice speaks as to the guilt of three prisoners, and is confirmed as to two of them only, the jury may, no doubt, if they please, act on the evidence of the accomplice alone as to the third prisoner; but it is proper for the judge in such a case to advise the jury that it is safer to require confirmation of the testimony of the accomplice as to the third prisoner, and not to act upon his evidence alone; for nothing is so easy as for the accomplice, speaking truly as to all the other facts of the case, to put the third man in his own place; but a jury may, if they choose, act on the unconfirmed testimony of an accomplice. . . .

Parke, B.—. . . During the time that I have been upon the Bench, now more than a quarter of a century, I have uniformly laid down the rule of practice as it has been stated by the Lord Chief Justice. I have told the jury that it was competent for them to find a prisoner guilty upon the unsupported testimony of an accomplice; but that great caution should be exercised, and I have advised them—and juries have acted on that advice—not to find a prisoner guilty on such testimony unless it was confirmed. There has been a difference of opinion as to what corroboration is requisite, but my practice has always been to direct the jury not to convict unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the identity of the prisoner. . . .

The view that corroboration is not required by law in support of an accomplice's evidence, but only as a rule of prudence, has not been universally accepted (*d*), but the fact that judges have in particular instances virtually withdrawn the case from the jury, when they have considered the

(*c*) (1855) Dears. C. C. 555; followed in *In re Meunier* [1894] 2 Q. B. 415, 418.

(*d*) See Wills on Circumstantial Evidence, 5th ed., 1902, p. 365; cf. *R.* v. *Neal* (1835) 7 C. & P. 168.

evidence of the accomplice alone untrustworthy, hardly appears to justify the doubts entertained as to the scope of the rule as above stated.

It follows from what has been said that the limitations sometimes put to the corroboration admissible in such cases, as that it must not be merely the evidence of another accomplice (*e*) or of the accomplice's wife (*f*), are merely illustrations of the cautions which a judge may wisely address to the jury, but are not to be regarded as rules of law.

(ii) *Claims against the estate of deceased persons.*—Again, it is a maxim of prudence, and not a rule of law, for the prevention of perjury and the protection of dead men's estates from unfounded claims, that credence should not be given to the unsupported testimony of a person claiming a gift, debt, or release against the estate of a deceased person, unless his evidence brings the clearest conviction to the tribunal which has to try the question (*g*). But in this case as in the last, although the judge or jury should examine with care and even with suspicion the evidence of the single witness which lacks corroboration, yet if they are completely satisfied of its honesty and truth, they ought to give effect to it (*h*).

(iii) *Rape and kindred offences against girls and women.*—There is one head of corroborative evidence, involving an exception to the general principle which excludes previous statements and hearsay, which by reason of its great importance as well as its ancient origin demands somewhat full mention; namely, evidence of complaints by women or girls, in cases of rape and kindred offences, made recently after the commission of the offence. For many years great difference of opinion existed, as shown by the various decisions, as to the

(*e*) *R.* v. *Noakes* (1832) 5 C. & P. 326.

(*f*) *R.* v. *Neal* (1835) 7 C. & P. 168.

(*g*) *Re Finch* (1882) 23 Ch. D. 267; *Re Garnett* (1885) 31 Ch. D. 1; *Re Hodgson* (1885) *ibid.* 177.

(*h*) *Rawlinson* v. *Scholes* (1898) 79 L. T. 350.

grounds on which this exceptional head of evidence rested and the limits of its admissibility. It was not clear whether it was admitted as part of the res gestæ or as an exceptional medium of proof of the offence itself or merely as evidence which tended to confirm the complainant's story. And again it was not clear whether the evidence must be confined to the mere allegation that *a* complaint had been made, or might extend to proving that in consequence of it the prisoner had been arrested (thereby clearly indicating that it was to him that the complaint had related and leaving the jury to surmise the nature of the complaint), or again might extend still further to the proof of the whole statement made by the injured woman. As however most of these questions were set at rest in the year 1896 by the judgment of the Court for Crown Cases Reserved in the case of *R.* v. *Lillyman* (*i*) it does not seem worth while to set forth here, as was done in the first edition of this work, the previous state of the authorities (*k*).

That case decided that upon the trial of an indictment for rape or other kindred offences against women or girls the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of such complaint, may, so far as they relate to the charge against the prisoner, be given in evidence on the part of the prosecution, not as being evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as negativing consent on her part when consent is in issue.

The judgment of the court deals with both the grounds

(*i*) [1896] 2 Q. B. 167.

(*k*) In the first edition this head of evidence was placed in Part III among the various Declarations which form exceptions to the general principle of direct oral evidence, as being on the whole the most logical and convenient place for it. But the case of *R.* v. *Lillyman* makes it clear that it forms a special head of corroborative evidence, and so will take its place most naturally in the present Chapter.

and the scope of this anomalous head of evidence. As to the first they said :—

It is necessary, in the first place, to have a clear understanding as to the principles upon which evidence of such a complaint not on oath, nor made in the presence of a prisoner, nor forming part of the res gestæ, can be admitted. It clearly is not admissible as evidence of the facts complained of : those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted. The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains.

In every one of the old text books proof of complaint is treated as a most material element in the establishment of a charge of rape or other kindred charge. In Hawkins' Pleas of the Crown, bk. i. c. 41, s. 9, it is said : "It is a strong, but not a conclusive, presumption against a woman that she made no complaint in a reasonable time after the fact" ; and in Blackstone's Commentaries, vol. iv. c. 15, p. 211 (1), referring to the time when Bracton wrote (in the reign of Henry III), it is said : "But in order to prevent malicious accusations it was then the law that the woman should immediately after, *dum recens fuerit maleficium*, go to the next town and there make discovery to some creditable persons of the injury she has suffered." Later on, at p. 213, it is said : "And first the party ravished may give evidence upon oath, and is in law a competent witness ; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance, if the witness be of good fame ; if she presently discovered the offence, and made search for the offender . . . these and the like are concurring circumstances, which give greater probability to her evidence. But on the other side, if she be of evil fame, and stand unsupported by others ; if she concealed the injury for any considerable time, after she had opportunity to complain ; if the place, where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry ; these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned. It is too late therefore, now to make serious objection to the admissibility of evidence of the fact that a complaint was made, provided it was made as speedily after the acts complained of as could reasonably be expected."

And in dealing with the question whether the particulars of the complaint are admissible, the judgment proceeds :—

After very careful consideration we have arrived at the conclusion

that we are bound by no authority to support the existing usage of limiting evidence of the complaint to the bare fact that a complaint was made, and that reason and good sense are against our doing so. The evidence is admissible only upon the ground that it was a complaint of that which is charged against the prisoner, and can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness-box negativing her consent, and affirming that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her. The jury, and they only, are the persons to be satisfied whether the woman's conduct was so consistent or not. Without proof of her condition, demeanour, and verbal expressions, all of which are of vital importance in the consideration of that question, how is it possible for them satisfactorily to determine it? Is it to be left to the witness to whom the statement is made to determine and report to the jury whether what the woman said amounted to a real complaint? And are the jury bound to accept the witness's interpretation of her words as binding upon them without having the whole statement before them, and without having the power to require it to be disclosed to them, even though they may feel it essential to enable them to form a reliable opinion? For it must be borne in mind that if such evidence is inadmissible when offered by the prosecution, the jury cannot alter the rule of evidence and make it admissible by asking for it themselves.

In *R.* v. *Lillyman* the prisoner had been charged on three counts, namely, for attempt to have carnal knowledge of a girl above 13 and under 16, for assault with intent to ravish, and for indecent assault. The prisoner was found guilty on the first count only, in respect of which it was not necessary to prove want of consent, but the prosecutrix swore that what was done was in fact done without her consent. This state of the case led to the question being afterwards raised whether the decision applied at all to a case where want of consent is not a necessary issue in law and is not raised in fact. This question was set at rest by the decision of the court in *R.* v. *Osborne* (*l*) where it was held that in cases of this class evidence of the complaint is admissible not merely as nega-

(*l*) [1905] 1 K. B. 551.

tiving consent, but as corroborating the credibility of the girl and as evidence of the consistency of her conduct.

The complaint in order to be admissible must be made "as speedily after the acts complained of as could reasonably be expected" (*m*). No attempt was made to define this limit of time, and it is obvious that no such definition could be justly made; it may be a matter of minutes, or hours, or days, according to the circumstances of each particular case (*n*). The complaint must also be voluntary in character—that is to say, although not inadmissible merely because it consisted of an answer to a question, the question which elicited it must not be of a leading, inducing or intimidating character; for if it is, the complaint will be inadmissible (*o*).

It was decided before the case of *R.* v. *Lillyman* that the death of the complainant was no bar to proving the fact that a complaint was made (*p*). It is not clear from the judgment in that case how the law now stands on this point. If evidence of the complaint is only admissible to confirm the prosecutrix's evidence, then in the event of her death it cannot be proved at all, unless perhaps in confirmation of her dying declaration, if she make one. If on the other hand evidence of the complaint were held admissible in the event of her death, to confirm the testimony of any other credible witness who gives evidence of the rape, it would seem that all the terms of the complaint would now be admissible.

Before the decision in *R.* v. *Lillyman* (*q*) there was some ground for supposing that the principle on which this head of evidence was admitted was of general application;

(*m*) *R.* v. *Lillyman* [1896] 2 Q. B. 167, 171; cf. *R.* v. *Osborne* [1905] 1 K. B. 551, 561.

(*n*) See on this the interesting passage in Blackstone's Commentaries, vol. iv. Chap. 15, and the ancient authorities there cited.

(*o*) *R.* v. *Osborne* [1905] 1 K. B. 551.

(*p*) *R.* v. *Megson* (1840) 9 C. & P. 420; cf. *R.* v. *Nicholas* (1846) 2 C. & K. 246.

(*q*) [1896] 2 Q. B. 167.

evidence of similar kind seems to have been admitted in an action by husband and wife for damages for wounding the wife (*r*), and evidence having a remote resemblance to it has been given in prosecutions for manslaughter (*s*), robbery (*t*), and shooting (*u*). It is obvious that such evidence might occasionally be of considerable value, as for example in actions under Lord Campbell's Act (*x*) for damages for tortiously causing the death of husband, wife, parent, or child. But it seems doubtful whether in future such complaints will be held admissible in cases not covered by the above decision in *R.* v. *Lillyman* (*y*) save where they are practically contemporaneous with the injury, and are so held to form part of the res gestæ (*z*) or to be declarations as to state of health (*zz*).

§ 2. Corroboration required by Law.

In the following cases corroboration is rendered necessary by a rule of common law or statute.

(i) *Perjury.*—In prosecutions for Perjury it is essential that the principal witness called for the prosecution to prove

(*r*) *Thompson* v. *Trevanion* (1693) Skin. 402, cited also above at p. 205.

(*s*) *R.* v. *Foster* (1834) 6 C. & P. 325.

(*t*) *R.* v. *Wink*, *ibid.* 397.

(*u*) *R.* v. *Ridsdale*, reported in Roscoe's Crim. Ev., 12th ed., p. 23.

(*x*) 9 & 10 Vict. c. 93, amended by 28 & 29 Vict. c. 95.

(*y*) [1896] 2 Q. B. 167.

(*z*) As to this ground of admissibility see *R.* v. *Lunny* (1854) 6 Cox, 477; *R.* v. *Bedingfield* (1879) 14 Cox, 341, and pp. 10—13, 91—98 above. So far the only recent reported case in the Supreme Court in which a declaration of this description has been rejected is hardly an authority for their exclusion, as the argument for admissibility appears to have rested solely on *R.* v. *Lillyman*, a case which clearly deals only with rape and kindred offences, which on historical grounds can be clearly shown to stand on a special footing. The case referred to is *Beatty* v. *Cullingworth* (1896) 60 J. P. at p. 740, note, affirmed in C. A. (1897); see Times, 14th Jan. 1897, an action for damages against a surgeon for performance of an operation on the plaintiff without her consent.

(*zz*) For these, see above, pp. 203, 205.

the defendant's false swearing should be corroborated; the ground of the rule being that otherwise the jury would have the perilous task of deciding between the oath of the witness on one side and that previously sworn by the prisoner on the other (*a*).

(ii) *Treason.*—In prosecutions for High Treason, save where the offence charged is the compassing or imagining the death or bodily injury of the Sovereign, it is necessary that there should be at least two witnesses, either both to one overt act, or one to one overt act and the other to another (*b*).

(iii) *Affiliation.*—It is provided by the Bastardy Acts that in affiliation proceedings the evidence of the mother must be corroborated in some material particular by other evidence (*c*).

(iv) *Breach of Promise of Marriage.*—By sect. 2 of the Evidence Further Amendment Act, 1869 (*d*), which rendered the parties to an action for breach of promise of marriage competent to give evidence in such action, it is provided that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless her or his testimony shall be corroborated by some other material evidence in support of such promise.

(v) *Offences against Girls and Women.*—In prosecutions under sects. 2, 3 or 4 of the Criminal Law Amendment Act, 1885 (*e*), no conviction can be had on the evidence of one witness unless such witness be corroborated in some material particular by evidence implicating the accused.

(*a*) *R.* v. *Muscott*, 10 Mod. 192.

(*b*) 7 & 8 Will. 3 c. 3 ss. 2 and 4; 39 & 40 Geo. 3 c. 93; 5 & 6 Vict. c. 51 s. 1.

(*c*) 8 & 9 Vict. c. 10 s. 6; 35 & 36 Vict. c. 65 s. 4; *R.* v. *Pearcy* (1852) 17 Q. B. 902, note (*a*); *Cole* v. *Manning* (1877) 46 L. J. M. C. 175.

(*d*) 32 & 33 Vict. c. 68; *Bessela* v. *Stern* (1877) 2 C. P. D. 265; *Wiedeman* v. *Walpole* [1891] 2 Q. B. 534. See pp. 155—157 above, where this case is cited at length.

(*e*) 48 & 49 Vict. c. 69. See pp. 133, 141, above.

(vi) *Cruelty to Children.*—In prosecutions under the Prevention of Cruelty to Children Act, 1904 (*f*), it is provided that a person shall not be liable to be convicted of the offence unless the unsworn testimony of any child witness given by virtue of sect. 15 is corroborated by some material evidence in support thereof implicating the accused.

(vii) *Pauper Removal.*—In a proceeding for removal of a pauper settled under sect. 34 of the Divided Parishes and Poor Law Amendment Act, 1876 (*g*) an order for removal is not to be made upon the evidence of the person to be removed without such corroboration as the justices or court think sufficient.

As to the form in which corroborative evidence is adduced, it is to be observed that although the effect of it is to support the veracity of some witness who has already testified, it is not proper to address it in form directly to that end. A witness called to corroborate the evidence of a former witness may not ordinarily be asked if that witness is a truthful man, or if the evidence he has given is accurate. It is only occasionally when a number of witnesses are called to speak to the same point, that for convenience' sake and to save time the judge will sometimes allow them to be examined thus: "Have you heard the evidence given by A (a previous witness)?" "Do you agree with it?" In other cases corroborative evidence is addressed directly to the proof of the relevant facts or some part of them in the ordinary way.

Corroboration generally implies the testimony in some form of an independent mind (*h*). The independent mind may be that of a witness who is not a party to the proceedings, or that of the party himself against whom the evidence is tendered (*i*). In civil cases therefore corroboration does not

(*f*) 4 Edw. 7 c. 15. See as to this Act pp. 124, 141, above.

(*g*) 39 & 40 Vict. c. 61. See *R.* v. *Guardians of Abergavenny Union* (1880) 6 Q. B. D. 31.

(*h*) *R.* v. *Braithwaite* (1859) 1 F. & F. 638.

(*i*) See the cases cited under note (*d*) on the preceding page.

necessarily involve calling a second witness, since the opposite party may have made admissions in his answers to interrogatories or to a notice to admit facts, or he may at the hearing make admissions of facts or documents which may amount to corroboration. In criminal cases, where no admissions can be made, it seems to be clear that there can be no corroboration without a second witness (*k*). It is not however necessary that the corroborating witness should prove the whole fact in issue, or cover with his evidence precisely the same ground as the witness he corroborates; his evidence is deemed corroborative if it proves some material part or circumstance of the facts in issue (*l*).

The mere fact that a defendant, though in court at the hearing, does not go into the witness-box to dispute the case made against him, is not of itself corroborative evidence where corroboration is necessary to the plaintiff's case (*m*).

(*k*) *R.* v. *Yates* (1841) C. & M. 132; *R.* v. *Hook* (1858) D. & B. 606; *R.* v. *Shaw* (1865) L. & C. 579. The earlier ruling in *R.* v. *Mayhew* (1834) 6 C. & P. 315, seems erroneous.

(*l*) *R.* v. *Hook* and *R.* v. *Shaw*, *supra*; and per Cockburn C. J. in *Bessela* v. *Stern* (1877) 2 C. P. D. 265, at p. 271. This also seems to be the meaning of Tindal C. J. in *R.* v. *Parker* (1842) C. & M. 639.

(*m*) *Semble*, this is the effect of the remark of Kay L. J. in *Wiedeman* v. *Walpole* [1891] 2 Q. B. 534, at p. 536; cf. s. 1 (b) of the Criminal Evidence Act, 1898, p. 468, below, prohibiting comment by the prosecution on the defendant's failure to give evidence.

CHAPTER IV.

PRIMARY EVIDENCE OF PRIVATE DOCUMENTS.

§ 1. *Production of Document.*
(i) *Production by the Party himself.*
(ii) *Production by his Opponent.*
(iii) *Production by a Third Person.*
§ 2. *Proof of Document when Modern.*
(i) *Proof by Ordinary Witnesses.*
(a) *Handwriting or Signature.*
(b) *Sealing.*
(c) *Delivery.*
(ii) *Proof by or through Attesting Witnesses.*
(iii) *Proof by Notice to Admit.*
§ 3. *Proof of Document when Ancient.*
(i) *Custody.*
(ii) *Apparent Regularity.*

For the purpose of adduction documents are divided into public and private. Generally those which are classed as public are kept in some official or special custody and are not produced in court but proved by means of examined or office copies. They are considered separately in Chapter VII of this Part. All other documents are classed as private, and their proof is the subject of this and the two following Chapters.

With regard to the adduction of private documents the principle that the Best Evidence must be given that the nature of the case will admit is exhibited first of all in the rule that the contents of documents must be brought to the cognizance of the judge and jury by the production of the originals themselves for inspection in court. This is called primary evidence, in contrast with secondary evidence by

means of copies or oral testimony, which is only admissible under special conditions to be mentioned in Chapter VI. It is not however sufficient merely to produce the original for inspection in court; it is also necessary to prove it, by giving evidence that all conditions of its validity or authenticity—as signing, sealing, delivery and attestation, or such of them as may be applicable to the particular document—were duly performed; and the nature of this proof differs in important particulars according as the document is ancient or modern; a document being deemed ancient for this purpose if it is thirty years old or more. The present Chapter deals with primary evidence of private documents both modern and ancient.

§ 1. Production of Document.

The original document must be produced in court for inspection (*a*).

No similar rule exists in regard to chattels; it has never been held, for instance, when the issue is as to the soundness of a horse, or the equality of goods to sample, or the infringement of copyright in a picture, that the chattel alone is primary evidence, so as to render necessary its production in court for the inspection of the jury (*b*). But it sometimes happens that a document, instead of being required as a piece of evidence (whether as a res gesta, as a contract or a libel; or as medium of proof of some fact, as an admission or a declaration—in which case its terms are all-important—) is but the subject of conflicting claims touching its possession or existence, as any other chattel might be; and in such case, so far as production is concerned, the document is regarded as any

(*a*) *Queen's Case* (1820) 2 B. & B. 286; *Strother* v. *Barr* (1828) 5 Bing. 136, 144; *Vincent* v. *Cole* (1828) M. & M. 257; *Boosey* v. *Davidson* (1849) 13 Q. B. 257.

(*b*) *R.* v. *Francis* (1874) L. R. 2 C. C. R. 128, 133; *Lucas* v. *Williams* [1892] 2 Q. B. 117. See above, pp. 116—120.

other chattel, and there is no legal obligation to produce it. In an action for trover for the certificate of a ship's registry, the existence of the certificate was proved by the production of the original registry from which the certificate was copied. This was objected to as secondary evidence, but Lord Alvanley, C. J., said that its production could have answered no purpose. The question was whether it was wrongfully detained, not what were its contents, and the proof which had been given of its existence did not violate the rules of evidence (*c*). But generally it may be said that wherever there is an issue as to the precise terms, or as to the genuineness of a document, the original must be produced.

This is well illustrated by the case of *R.* v. *Elworthy* (*d*). The defendant, a solicitor, had procured a loan for a client named Cannon, one of the terms of the loan being that Cannon should make a certain statutory declaration. Cannon was subsequently charged with perjury in respect of certain statements contained in the declaration, and on his trial Elworthy was called as a witness for the prosecution. Thereupon Cannon, to exonerate himself from the charge against him, asked Elworthy in cross-examination whether there had not been a draft of the statutory declaration which he, Cannon, had seen and corrected in the very particulars in which its truthfulness was impugned, and whether Elworthy had not engrossed the declaration in disregard of the corrections and allowed Cannon to swear it under the impression that it was in accordance with the corrected draft. Elworthy however denied that there had ever been such a draft, and for this statement he was now charged with perjury. And in support of the indictment against him Cannon and his wife tendered oral evidence of the contents of the draft declaration, and after objection on the ground that the defendant Elworthy had had no notice to produce the document, the evidence was

(*c*) *Bucher* v. *Jarratt* (1802) 3 B. & P. 143, 146.
(*d*) (1867) L. R. 1 C. C. R. 103.

admitted. But it was held by the Court for Crown Cases Reserved that it was inadmissible. Bramwell B. said :—

> If the question had been only as to the existence of the draft, it might have been different; but here the prosecution gave evidence of the alterations and contents in order to show wilful perjury. These contents therefore became material; and the general rule then applied that you must give the best evidence. The exception suggested is, that the indictment itself was notice; but that exception does not apply here, as the prosecution might have contented themselves with proving the existence of the draft and no more; whereas they did, in fact, give evidence of its contents.

So in prosecutions for forgery the document alleged to be forged must be produced (*e*).

The rule has often been brought into play in cases where one of the parties seeks to prove a contract by oral evidence, while the other contends that it has been reduced into writing and that the writing must accordingly be produced. This kind of contest has most frequently arisen either where the document was unstamped and each party was desirous of avoiding the obligation of paying the penalties prescribed by the Stamp Acts, and throwing that burden on his opponent; or in connection with claims by contractors in respect of extras. If one of the parties, having in examination-in-chief proved a contract without reference to any document and therefore apparently oral in its terms, is afterwards compelled in cross-examination to admit that the contract was reduced to writing, his former evidence is displaced and he must produce the document in order to prove his case. If on the other hand he succeeds in making out a *primâ facie* case independent of any written contract, it lies on the other party, if he contends that the contract was reduced into writing, to produce it as part of his own evidence (*f*). Thus where in an action for work and labour the plaintiff proved a *primâ facie* case and it was first

(*e*) *R.* v. *Haworth* (1829) 4 C. & P. 254.
(*f*) *R.* v. *Padstow* (1832) 4 B. & Ad. 208, 210.

suggested by one of the defendant's witnesses that the terms of employment were contained in writing, the plaintiff was held not obliged to put in the agreement, which was unstamped (*g*). Had the plaintiff been cross-examined on the point and admitted the existence of the document he, and not the defendant, would have been compelled to put it in (*h*). So in an action for extras, if it appear in the course of the plaintiff's case that the principal work was done under a contract in writing, the plaintiff is bound to produce the writing to show whether the work sued for was extra of it or not (*i*), unless he is in a position to show clearly that the so-called extras were done under an order entirely distinct from the original contract (*k*). Thus where the plaintiffs were employed under a written contract to do the inside work of a house and while carrying this out a fresh order was given by word of mouth for the execution of some work outside, for payment of which the action was brought, it was held that the written agreement as to the inside work need not be produced (*k*). So in actions based on agreements of tenancy, if the party setting up the agreement admits that its terms were reduced to writing, oral evidence may not be given to show who was the tenant (*l*), nor what was the amount of the agreed rent (*m*), nor that rent had accrued due at a particular date (*n*). But it has been held that the mere relationship of tenancy where the terms of it are immaterial may, notwithstanding the existence of an agreement in writing, be proved by the occupation of land and payment of rent by A to B (*o*). Where the existence of a written

(*g*) *Fielder* v. *Ray* (1829) 6 Bing. 332.

(*h*) *Brewer* v. *Palmer* (1800) 3 Esp. 213.

(*i*) *Vincent* v. *Cole* (1828) M. & M. 257; *Buxton* v. *Cornish* (1844) 12 M. & W. 426.

(*k*) *Reid* v. *Batte* (1829) M. & M. 413.

(*l*) *R.* v. *Rawden* (1828) 8 B. & C. 708.

(*m*) *R.* v. *Merthyr Tydvil* (1830) 1 B. & Ad. 29.

(*n*) *Augustien* v. *Challis* (1847) 1 Ex. 279.

(*o*) *R.* v. *Holy Trinity* (1827) 7 B. & C. 611; *Doe* v. *Harvey* (1832) 8 Bing.

contract is admitted by a witness, the cross-examining party is entitled to ask whether such agreement relates to the subject-matter of the suit, for although he thus seeks to obtain oral evidence as to the contents of a written document, it is clear that to this extent oral evidence is indispensable (*p*).

The document to be produced may be in the possession either of the party who intends to adduce it in evidence, or of his opponent, or of a stranger to the proceeding.

(i) *Production by the Party himself.*—In the first case, there can be no difficulty about its production; the party will himself bring it into court.

(ii) *Production by his Opponent.*—The ordinary mode by which a party obtains production of a document which is in the possession or exclusive control of his opponent is to give the latter, a reasonable time before the trial, notice to produce it at the trial, and then at the trial to call for its production accordingly. In civil cases there is a prescribed written form for such a notice; in criminal cases it is also usually written, though an oral notice is valid (*q*); but such notice is not a valid method of procuring production of documents from the prosecutor, since the Crown and not he is the party suing; for this purpose the prosecutor must be classed as a stranger (*r*).

Inasmuch as the purpose of a notice to produce is not to give the opponent time to prepare evidence to explain or rebut the original document, but merely to enable him to have it

239, 242; *qu. Cotterill* v. *Hobby* (1825) 4 B. & C. 465. This exception seems contrary to principle, since although payment of money from A (the tenant) to B (the landlord) may be proved, directly it is called "rent" the relationship called tenure is implied, which involves a reference to the agreement of tenancy. See per Best C. J. in *Strother* v. *Barr* (1828) 5 Bing. 136, at p. 152.

(*p*) *Curtis* v. *Greated* (1834) 1 A. & E. 167.

(*q*) *Smith* v. *Young* (1808) 1 Camp. 439; cf. *Att.-Gen.* v. *Le Marchant* (1772) 2 T. R. 201, note (*a*).

(*r*) See p. 362: and cf. pp. 128, 135.

in court and exclude the argument that the party who serves it has not taken all reasonable means to procure its production (*s*), the notice should be served within a reasonable time before the trial as measured by this object. What is a reasonable time must depend on the circumstances of the case, as the nature and age of the document, its probable custody, and the residence and convenience of the party or other person in whose custody it is (*t*). The notice must specify with reasonable particularity the documents required to be produced. A full specification comprises a short description of each document (as deed, will, letter, &c.), together with a statement of its date and the names of the parties. Where these cannot all be given, the party should still identify the documents required as far as possible, by giving such of these particulars as he is in a position to do, coupled, if necessary, with others as to subject-matter, &c. (*u*).

A form of notice to produce will be found in Appendix D (*x*).

The party who produces a document when called for at the hearing is entitled to insist that it shall be put in evidence by his opponent, if the latter not only causes it to be so produced but also makes use of it, (as by inspecting its contents), provided of course that it is material to the issue; and it is for the judge to say whether it has been so used as to make it fair that it shall be given in evidence by the party who has called for it (*y*).

(*s*) *Dwyer* v. *Collins* (1852) 7 Ex. 639.

(*t*) *Lawrence* v. *Clark* (1845) 14 M. & W. 250.

(*u*) *Jacob* v. *Lee* (1837) 2 M. & R. 33 ("all and every letters written by the said plaintiff to the said defendant relating to the matters in dispute in this action"); *Rogers* v. *Custance* (1839) 2 M. & R. 179 ("all . . . . accounts . . . . relating to the matters in question in this cause"); *Morris* v. *Hauser* (1841) 2 M. & R. 392 ("all letters between the parties between the years 1837 and 1841"); *Conybeare* v. *Farries* (1869) L. R. 5 Ex. 16 ("all letters relating to your tenancy of a room"). Contrast with this the rule as to the form and effect of *subpœna duces tecum*, at pp. 363, 364, below.

(*x*) See p. 480; and see last note.

(*y*) *Sayer* v. *Kitchen* (1794) 1 Esp. 209; *Wharam* v. *Routledge* (1805) 5 Esp.

If the opponent, having a document in his possession, refuses to produce it when called upon at the hearing to do so he is not at liberty afterwards to give the document in evidence for any purpose (*z*). Since it is generally to the interest of a party against whom a document is intended to be adduced that his opponent should have no opportunity of misstating its terms, and the refusal to comply with the notice to produce a document in his possession has the effect of letting in secondary evidence, such notice is generally effectual to insure the production of the document. It sometimes happens however that the party in possession of the document may have reasons for withholding it which outweigh that disadvantage, as for instance where the document has been dishonestly tampered with. In such cases the notice cannot always be relied on, and in civil cases the production of the document must then be secured by the service on the party of a writ of *subpœna duces tecum*, the wilful disobedience to which involves liability to proceedings for contempt, as well as to an action for any damages occasioned by the withholding of the evidence (*a*). In criminal cases documents which tend to compromise the defendant are generally in the custody of the prosecution.

In civil cases a party is enabled to ascertain before the trial what material documents are in the possession of his opponent, by means of the process of Discovery and Inspection, which is regulated by Order XXXI of the Rules of the Supreme Court, of which Rules 12 and 15 are as follows:—

Rule 12. Any party may without filing any affidavit, apply to the court or a judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein.

235; *Wilson* v. *Bowie* (1823) 1 C. & P. 8; *Calvert* v. *Flower* (1836) 7 C. & P. 386; and see above, p. 331.

(*z*) *Doe* v. *Hodgson* (1840) 12 A. & E. 135; *Collins* v. *Gashon* (1860) 2 F. & F. 47. Cf. p. 403 below.

(*a*) See pp. 309, 311.

On the hearing of such application the court or judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or make such order, either generally or limited to certain classes of documents, as may in their or his discretion be thought fit. Provided that discovery shall not be ordered when and so far as the court or judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

Rule 15. Every party to a cause or matter shall be entitled, at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the court or judge shall deem sufficient for not complying with such notice: in which case the court or judge may allow the same to be put in evidence on such terms as to costs and otherwise as the court or judge shall think fit.

Rules 10 and 13 of Order XVI of the County Court Rules, 1903, are in similar terms.

The grounds of privilege on which inspection may be withheld, if duly verified by affidavit, are set out in Chapter XIII of Part III.

The forms relating to Discovery and Inspection are set out in Appendix D (*b*).

The details of the procedure with regard to Discovery and Inspection are so fully dealt with in books of practice that it does not appear desirable to set them forth here.

(iii) *Production by a Third Person.*—In civil cases in the Supreme Court, should the document be in the possession of a stranger who cannot be relied on to produce it voluntarily at the party's request, the latter may by means of a writ of

(*b*) See pp. 480—482.

subpœna duces tecum compel his attendance with the document at the trial (*c*). In criminal cases, whenever the defendant has been committed for trial by a coroner or justices, the prosecutor and the witnesses for the prosecution are bound by their recognizances to appear and give evidence in the court where the trial is to be held, and this involves the obligation to produce any documents in their possession given in evidence before the justices (*d*). But if it should be considered desirable that they should be compelled to produce other documents also in their possession, and in any case where witnesses have not been so bound by recognizances, they may be served with writs of *subpœna duces tecum* issued either by the Crown Office or by the clerk of the court of assize or quarter sessions where the defendant is to be tried, and for disobedience to such subpœna the witnesses will be liable to attachment (*f*). The attendance of witnesses absent, in Scotland and Ireland, of witnesses undergoing imprisonment, and of witnesses required to attend in a County Court, has already been dealt with above (*g*), and the statements there made apply equally when their attendance is required merely for the production of documents. For the mode of securing the attendance of a witness under the Fugitive Offenders Act, 1881 (*h*), see sect. 15 of that Act.

In the *subpœna duces tecum* the party is bound to specify the particular documents of which he requires the production at the hearing; he is not entitled to frame it in general terms, as if it were a bill of discovery or even a notice to produce, as he is not entitled to cast on a witness who is no

(*c*) For the practice as to *subpœnas* in civil cases, see pp. 309—311.

(*d*) Cf. pp. 309—311. The documents ought not to be annexed to the depositions; Stone's Justices' Manual, 38th ed. 1906, p. 10, note (*a*).

(*f*) For the practice see Archbold's Cr. Plead. 23rd ed. 1905, p. 411; and Practice of the Crown Office, by Short and Mellor, Chap. XX.

(*g*) See pp. 309, 311.

(*h*) 44 & 45 Vict. c. 69.

party to the proceedings the burden which this would involve (*i*).

Closely resembling the *subpœna duces tecum* in effect is an order made in a civil cause in the Supreme Court under Rule 7 of Order XXXVII, which is as follows:—

7. The court or a judge may in any cause or matter at any stage of the proceedings order the attendance of any person for the purpose of producing any writings or other documents named in the order which the court or judge may think fit to be produced: Provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the hearing or trial.

8. Any person wilfully disobeying any order requiring his attendance for the purpose of being examined or producing any document shall be deemed guilty of contempt of court, and may be dealt with accordingly.

The object of these rules was to remove the difficulties which existed in compelling production of documents at various stages of civil proceedings, before and after the trial, as for example upon the hearing of motions, petitions, summonses, examinations of witnesses and the like; it confers no right of discovery, and therefore no right to make an order for inspection before the hearing of documents belonging to persons who are not parties to the proceeding (*k*).

Rules 20 and 21 of Order XVIII of the County Court Rules, 1903, are in similar terms.

If any person having a particular document in his possession in court, is sworn as a witness in the case, he may be ordered by the judge to produce the document, although he has not been served with a *subpœna duces tecum* (*l*). And it

(*i*) *Lee* v. *Angus* (1866) L. R. 2 Eq. 59; *Burchard* v. *McFarlane* [1891] 2 Q. B. 241, 247, 251.

(*k*) *Elder* v. *Carter* (1890) 25 Q. B. D. 194; following *Straker* v. *Reynolds* (1889) 22 Q. B. D. 262; cf. *O'Shea* v. *Wood* [1891] P. 286.

(*l*) *Snelgrove* v. *Stephens* (1842) C. & M. 508; cf. *Dwyer* v. *Collins* (1852) 7 Ex. 639. *Quære*, in the case of a party or stranger not sworn. See *Att.-Gen.* v. *Le Marchant* (1772) 2 T. R. 201 (a); *Law* v. *Wells* (1792) Pea. 93.

seems that in a criminal case any person in court may be ordered to give evidence as a witness (*m*).

§ 2. Proof of Document when Modern.

Assuming that production in court of the original document which the party seeks to give in evidence has been duly secured as mentioned in the last section, it has next to be proved; that is, evidence must be given to show that it satisfies the conditions necessary to give it the force ascribed it, as that it was written, signed, sealed, delivered and attested, as the case may be, by the persons and at the times that it purports or is alleged to have been. Moreover, if it is a document that requires a stamp, it will not be admissible in evidence unless it is duly stamped; but this condition is so special that it is reserved for separate discussion in the next Chapter.

With regard to the proof of documents, however, it is to be noted that the proof required of a particular document may vary to some extent according to the purpose for which it is tendered. For instance in order to prove a deed of grant containing certain recitals, it will be necessary, if it is tendered in evidence to establish the grant, to prove that it was duly signed, sealed, and delivered; whereas if it were tendered only to prove some fact admitted in the recitals, it will not be absolutely necessary to prove any of these conditions, if it can be shown that the recitals were inserted or adopted by the party against whom they are tendered. But in the latter case it is not really relied on as a deed at all. This distinction between a document tendered as an operative instrument and the same document used merely as a medium of proof of some fact referred to in it must be borne in mind throughout this Part (*n*).

(*m*) *R.* v. *Sadler* (1830) 4 C. & P. 218. And see p. 313.
(*n*) See as to this, Part II, Chap. V.

The only exception (subject to the above qualification) to the rule that a modern document must be duly proved in one of the ways hereinafter mentioned is where a party tenders in evidence a document which is produced by his opponent and under which the latter himself claims some interest which necessarily implies its valid execution. In such case the party tendering the document is not exonerated from complying with the provisions of the Stamp Acts, but he is dispensed as between him and his opponent from satisfying the other conditions of proof necessary to the admissibility of the document in evidence, as for example the calling of attesting witnesses. Formerly the rule was that the mere production of a document by the opposite party was in all cases deemed to be an admission by him of the due performance of these conditions; this was superseded by the rule that the execution of the document must be proved in every case; and this in its turn has given way to the present rule which is less extreme than either of the others and is based on the principle that a party shall not be allowed at once to approbate and reprobate the same document (*o*).

But if a party claim no interest under a deed and has never admitted it to be a valid document, the mere fact that it comes out of his possession will not dispense with the necessity of proving the execution of it (*p*), unless perhaps in the case where possession has been obtained by some trick or the deed is withheld for the purpose of preventing the other side from giving it in evidence, which amounts to an admission of its validity (*q*). So too it has been held that the rule does not apply where the party against whom it is tendered has ceased to claim any right under it (*p*); and it has been said

(*o*) *Pearce* v. *Hooper* (1810) 3 Taunt. 60; *Orr* v. *Morice* (1821) 3 B. & B. 139; followed in *Bradshaw* v. *Bennett* (1831) 1 M. & R. 143; and *Carr* v. *Burdiss* (1835) 1 C. M. & R. 782.

(*p*) *Doe* v. *Marquis of Cleveland* (1829) 9 B. & C. 864, at p. 869, per Lord Tenterden.

(*q*) *Doe* v. *Heming* (1826) 6 B. & C. 28.

that the interest must be an interest in the subject-matter of the cause and not a claim against some other person, in which case the deed is *res inter alios acta* (*r*).

The rules explained and illustrated in Parts II and III of this work are in the main applicable here also in dealing with the proof of documents, whether they are tendered as res gestæ or merely as media of proof of some fact. Thus it was held that a party was not entitled to prove that certain books were receivers' books by merely proving that other similar books, not necessarily connected with them, were of that character (*s*). So, the posting of letters may be proved by entries made by deceased clerks in the course of their duty (*t*); and the copy of a document, the original of which is withheld by the other side, may be proved in the like manner (*u*). An attesting witness may refresh his memory as to the execution of a deed which he is called to prove by inspecting his signature to the attestation clause (*x*). And in like manner there are many facts connected with the proof of documents as to which judicial notice and presumptions are applicable, as will be seen hereafter. In a few cases however certain special media of proof may be resorted to in the proof of documents, which are not admissible generally in proving other facts relevant to the issue. Thus, if the genuineness of a deed or will is impeached on the ground of forgery or fraud, and it is alleged that deceased attesting witnesses were accomplices therein, evidence is admissible of their good character (*y*). So the proof of the execution of a document by proof of the handwriting of a deceased attesting witness seems to involve a special exception to the general

(*r*) *Rearden* v. *Minter* (1843) 5 M. & G. 204.

(*s*) *Doe* v. *Thynne* (1808) 10 East, 206, 208; see below, p. 384.

(*t*) *Hagedorn* v. *Reid* (1813) 3 Camp. 377; see below, p. 375.

(*u*) *Pritt* v. *Fairclough* (1812) *ibid.* 305; see below, p. 405.

(*x*) *Maugham* v. *Hubbard* (1828) 8 B. & C. 14, 16; see p. 380.

(*y*) See p. 381.

rule against hearsay (*z*). Another important exception is admitted in the case of wills (*a*): wherever there is a question whether a will was the real act of the testator (*b*), or as to the contents of a will that has been lost or destroyed (*c*), or as to what papers constitute the will (*d*) the declarations of a testator made before the date of the execution are admitted. But it is doubtful how far in such cases declarations made after the date of execution are admissible (*e*), and it is clear that no such subsequent declaration is admissible to prove the execution of a will or of any erasure, interlineation, or alteration of it (*f*). Also where the will contains erasures or interlineations, declarations made by the testator before the date of execution are admissible to prove at what time the erasures or declarations were made (*g*).

The present section deals with modern private documents, namely, those less than thirty years old. The rules contained in it may however, where they can, be applied equally in the proof of ancient documents, that is to say, those which are thirty years old or more; but for the proof of the latter special facilities are provided by other rules which are the subject of the next section.

There are three distinct modes of proving modern private documents, namely, (i) proof by ordinary witnesses, (ii) by

(*z*) See p. 380.

(*a*) See pp. 372, 373.

(*b*) *Ellis* v. *Hardy* (1836) 1 Moo. & Rob. 525.

(*c*) *Johnson* v. *Lyford* (1868) L. R. 1 P. & D. 546; *Sugden* v. *Lord St. Leonards* (1876) 1 P. D. 154; see below, note (*g*).

(*d*) *Gould* v. *Lakes* (1880) 6 P. D. 1, questioned as to post-testamentary declarations; see note (*e*).

(*e*) *Woodward* v. *Goulstone* (1886) 11 A. C. 469; *Atkinson* v. *Morris* [1897] P. 40, and cases in next note, and on p. 373 below.

(*f*) *Doe* d. *Shallcross* v. *Palmer* (1851) 16 Q. B. 747; *In the goods of Sykes* (1873) L. R. 3 P. & D. 26; *In the goods of Adamson*, *ibid.* 253.

(*g*) The credibility of this class of declarations has been said to depend on their accompanying an act done, namely, the execution of the will: *Johnson* v. *Lyford*, at p. 547; but a better ground seems to be the testator's peculiar knowledge and the absence of any motive on his part save to speak the truth: cf. p. 225 *seq.* of *Sugden* v. *Lord St. Leonards*, cited *supra*.

attesting witnesses where the document has been attested, and (iii) by notice to admit. The first two are applicable in either civil or criminal proceedings, the third in civil only. It will be convenient to describe them in this order, although a notice to admit is to this extent made the first of these three modes of proof, that, where it is applicable, a party is liable to recover no costs of proving a document unless he has first had resort to it (*g*).

(i) *Proof by Ordinary Witnesses.*

(a) *Handwriting or Signature.*—The ordinary mode by which a person authenticates any document as being his own act or communication is by writing at the foot of it his own name, called his signature. But save in any case where it is expressly so prescribed by statute, this is not the sole mode of authentication or signature. A man may sign a document by affixing thereto a stamp containing a facsimile of his ordinary signature (*h*) or by signing his initials (*i*) or by making a cross or other mark against his name written by some other person (*j*) and it has been held that a printed bill-head containing a man's name may be a good memorandum signed by him within the meaning of the Statute of Frauds, if he writes the body of the memorandum beneath it (*k*).

Handwriting or signature is ordinarily proved in one of the following ways (*l*).

The best evidence of all, assuming of course that the witness is not unfriendly, is to call either the person who wrote it or some person who saw him write it, and so prove the fact by direct evidence.

(*g*) See p. 382.

(*h*) *Bennett* v. *Brumfitt* (1867) L. R. 3 C. P. 28.

(*i*) *In the Goods of Blewitt* (1880) 5 P. D. 116.

(*j*) *Baker* v. *Dening* (1838) 8 A. & G. 94.

(*k*) *Saunderson* v. *Jackson* (1800) 2 B. & P. 238; *Schneider* v. *Norris* (1814) 2 M. & S. 286; *Tourret* v. *Cripps* (1879) 48 L. J. Ch. 567.

(*l*) *Doe* v. *Suckermore* (1836) 5 A. & E. 703, 730, 731.

Secondly, when such direct evidence is not available, some witness must be called who can swear to the identity of the handwriting from his previous knowledge of other handwriting of the same person. That knowledge may have been acquired by seeing the person write, in which case it will be stronger or weaker according to the number of times and the periods and other circumstances under which the witness has seen him write; but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then merely sign his name (*m*). Again, the knowledge may have been acquired by the witness having seen letters or other documents which purport to be written or signed by the person in question and afterwards having had such communications or transactions with him as import a virtual acknowledgment on his part that the letters or documents are his. The witness may for example have communicated personally with that person upon the contents of those letters or documents, or have written answers to them which have produced either further correspondence or else acquiescence by the person in some matter to which they relate. In short such inference of authorship may arise from any mode of communication between the witness and such person, which would in the ordinary course of the transactions of life induce a reasonable presumption that the letters or documents were the handwriting of such person (*n*). And of course evidence of the identity of the writer must be added *aliunde*, if the witness be not personally acquainted with him (*o*).

A third mode of proof has been sanctioned by statute (*p*).

(*m*) *Garrells* v. *Alexander* (1801) 4 Esp. 37; *Powell* v. *Ford* (1817) 2 St. 164; *Lewis* v. *Sapio* (1827) M. & M. 39.

(*n*) B. N. P. 236; *Carey* v. *Pitt* (1797) Pea. Add. Ca. 130; *Harrington* v. *Fry* (1824) R. & M. 90; *Tharpe* v. *Gisburne* (1825) 2 C. & P. 21.

(*o*) *Doe* v. *Suckermore* (1836) 5 A. & E. 703, 731.

(*p*) 28 Vict. c. 18 s. 8. By virtue of sect. 1, this provision is made applicable to all courts of judicature as well criminal as all others.

It is enacted with regard both to civil and criminal cases, in the same terms, that—

> Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute (*q*).

The writing which is to be thus used as a standard may be proved, besides other ways, by the admission of the writer himself while under examination (*r*); or it may be written by him while he is in the witness-box undergoing examination (*s*). A witness who is called under this section need not be a professional expert or a person whose skill in the comparison of handwritings has been gained in the way of his profession or business; provided that he is a skilled witness and has gained adequate knowledge, it matters not how he came by that skill and knowledge (*t*).

The proof of handwriting necessarily involves the identification of the writer. But it sometimes happens that the handwriting or signature of a document cannot be identified in any of these ways as that of the person who is alleged to have written or signed it, but only as that of some person of the same name, so that some further evidence is necessary to establish personal identity. The mere identity of the names of the person proved to have written or signed the document and of the person sought to be charged with it will frequently be *primâ facie* evidence of their identity, unless the name happens to be a very common one (*u*). If

(*q*) And the convenient practice is to submit the writings to the inspection of the jury as soon as the comparison has been made by the witness: *Cresswell* v. *Jackson* (1860) 2 F. & F. 24.

(*r*) *Ibid.*

(*s*) *Cobbett* v. *Kilminster* (1865) 4 F. & F. 490.

(*t*) *R.* v. *Silverlock* [1894] 2 Q. B. 766. As to expert evidence, see p. 148 above.

(*u*) *Jones* v. *Jones* (1841) 9 M. & W. 75; *Sewell* v. *Evans* (1843) 4 Q. B. 626; *Hamber* v. *Roberts* (1849) 7 C. B. 861.

however a doubt is fairly thrown on the correctness of this inference, some further evidence of identity is necessary. The nature of this will depend upon circumstances: thus evidence may be given of the presence of the person to whom the document is attributed at the time and place when it was executed, or of identity not only of name but also of address and occupation (*x*), or of name and address alone (*y*), or of some acknowledgment of the document by the person charged with it.

As to the date of the writing or signature, if the document itself bears a date, it is presumed that that is the date at which it was written or signed; and this presumption is made not only against the person himself who wrote or signed it (*z*), but also against other persons (*a*); but this presumption may be negatived either by extrinsic (*b*) or intrinsic (*c*) evidence.

With regard to erasures and interlineations it is generally presumed, if the document be a deed, that they were made before the execution of the instrument; if a will, that they were made afterwards (*d*). In the case of a will, if the time of the alteration becomes a question of evidence, a special exception to the rule against hearsay permits any declarations of the testator made before the date of the execution of the will to be proved, but not those made after its execution (*e*); and

(*x*) *Harrington* v. *Fry* (1824) Ry. & Moo. 90.

(*y*) *Whitelocke* v. *Musgrove* (1833) 1 Cr. & M. 511, 522; *Greenshields* v. *Crawford* (1842) 9 M. & W. 314.

(*z*) *Hunt* v. *Massey* (1834) 5 B. & Ad. 902.

(*a*) *Anderson* v. *Weston* (1840) 6 Bing. N. C. 296, 301 *seq.*; *Potez* v. *Glossop* (1848) 2 Ex. 191; *Malpas* v. *Clements* (1850) 19 L. J. Q. B. 435.

(*b*) *Steele* v. *Mart* (1825) 4 B. & C. 272; cf. *In re Slater* (1897) 76 L. T. 529, 704.

(*c*) *In the Goods of Cadge* (1868) L. R. 1 P. & D. 543.

(*d*) *Doe* v. *Catomore* (1851) 16 Q. B. 745; see Theobald on Wills, 2nd ed. 1881, p. 32.

(*e*) *Doe* d. *Shallcross* v. *Palmer* (1851) 16 Q. B. 747; *In the Goods of Sykes* (1873) L. R. 3 P. & D. 26; *In the Goods of Adamson, ibid.* p. 253; *Dench* v. *Dench* (1877) 2 P. D. 60; and see above, p. 368, below, p. 405.

the fact that a date earlier than that of the execution of the will is attached to interlineations or erasures is not accepted as proof of their date; otherwise the Wills Act would be easily evaded (*f*), and in order to identify the document or documents which constitute the real will of the testator declarations made by him before, at, or (it would seem) after the date of execution thereof are admissible (*g*).

(b) *Sealing.*—Sealing is generally effected by affixing a waxen seal or a wafer upon the document, but it is also sufficient if the seal, stick or other instrument used be merely impressed on the plain parchment or paper with an intent to seal it (*h*). And either the seal may be affixed or impressed at the time by the party who signs the document, or he may acknowledge as his own a seal that has been previously affixed or impressed, as by touching it and declaring that the document is his act and deed (*i*), or by signing his name opposite to a seal on an instrument that bears a declaration that it has been sealed with his seal (*k*), or in any other manner which implies his adoption of the seal as his own.

Sealing is ordinarily proved in one of the following ways.

The party may call a witness who saw the seal actually affixed or impressed at the time of signature, or, if it was then already affixed or impressed, saw it acknowledged by the person who signed the document. The sealing may also be inferred from the fact that the person alleged to have sealed it is proved to have signed the instrument at a time when it contained a declaration that the seal opposite to the signature is his seal (*l*). And this inference may sometimes be drawn

(*f*) *In the Goods of Adamson* (1875) L. R. 3 P. & D. 253.

(*g*) *Gould* v. *Lakes* (1880) 6 P. D. 1; following *Sugden* v. *St. Leonards* (1876) 1 P. D. 154. But see p. 368.

(*h*) *R.* v. *St. Paul, Covent Garden* (1845) 7 Q. B. 232; *Re Sandilands* (1871) L. R. 6 C. P. 411; *S. C.* sub nom. *Re Mayer*, 40 L. J. C. P. 201.

(*i*) Williams' Real Property, 20th ed. 1906, p. 150.

(*k*) *Talbot* v. *Hodson* (1816) 7 Taunt. 251.

(*l*) *Ibid.*

notwithstanding the absence of any apparent impression or seal (*m*). If the document still bears the seal, its due sealing may also be inferred from the mere proof of the signature standing against it (*n*).

The presumption as to the date of the sealing is similar to that as to signing (*o*).

(c) *Delivery.*—The term "delivery" is used in a somewhat special sense with regard to deeds, as presently explained (*p*). In regard to letters, notices and most other documents it is generally used in its ordinary meaning to signify the physical transmission of the document from the sender to the recipient.

Delivery in this ordinary sense is proved in one of the following ways.

The best way is to call some witness who can prove either that he delivered it himself or that he saw it delivered by the person who did. In the case of a letter or other document delivered by hand the messenger may be called to prove its delivery at the time, in the mode, and to the person alleged. Or if he cannot be called, his delivery of it may be proved in some other way, as by some witness who saw him deliver the document in question, or, in the case of the messenger's death, by some admissible entry made by him in his books (*q*).

If the letter was sent by post, the person who posted it should be called to prove that fact. But it is not enough for the sender's clerk to say that the letter was sent by post on a particular day, if he has no recollection whether it was put in

(*m*) *Re Sandilands* (1871) L. R. 6 C. P. 411. For a case where the court refused to draw such an inference, see *Re Balkis Consolidated Co., Ltd.* (1888) 58 L. T. p. 300.

(*n*) *Grellier* v. *Neale* (1792) Pea. 147; cf. *Fassett* v. *Brown*, *ibid.* 23.

(*o*) *Anderson* v. *Weston* (1840) 6 Bing. N. C. 296, 301; and see above, p. 372.

(*p*) See pp. 376—378.

(*q*) See especially Chapters III and IV of Part III, pp. 178—194.

the post by himself or another clerk (*r*). Nor for the sender to prove that it was the regular usage of his office that letters for the post were always deposited on a particular table from which they were carried by a porter in his employ to the post-office and that in the particular case the letter was so put down on the table, unless he also calls evidence to prove that in this instance the porter took the letters from the table to the post; for the court will not presume that the course of business in a private office has the regularity of a public department (*s*). But if the porter is called, the mere fact that he has no recollection of the particular letter in question will not exclude his evidence, if he can swear that he invariably carried to the post-office all the letters found upon the table on which the particular letter is proved to have been placed (*t*). Where a solicitor's clerk stated that in the general course of business at his master's office he made up all letters to the agency clients, of whom the defendant was one, and placed them in a box in the room where he sat, and that the postman invariably called for them and took the letters from the box, and that the letter in question was thus made up by himself in the usual course of his duty as a clerk, it was held that there was evidence that the letter had been delivered to the postman and that the delivery to him was equivalent to the delivery to the post-office (*u*). If the letter was posted by a clerk who has since died, the posting may be proved by some admissible entry made by him in his books, as an entry made in the course of his duty (*v*).

When once it has been proved in one of these ways that a letter has been duly posted and it is also in evidence that it has not been returned, it will be presumed, till the contrary

(*r*) *Hawkes* v. *Salter* (1828) 4 Bing. 715.
(*s*) *Hetherington* v. *Kemp* (1815) 4 Camp. 193.
(*t*) *Ibid.*
(*u*) *Skilbeck* v. *Garbett* (1845) 7 Q. B. 846.
(*v*) *Hagedorn* v. *Reid* (1813) 3 Camp. 377; and see Chapters III and IV of Part III, pp. 178—194; also p. 367.

is shown, that it was duly delivered in accordance with the ordinary course of business in the post-office (*w*). Where the date of the posting of a letter cannot be accurately proved, the time of its delivery may be *primâ facie* inferred from the post-mark of the envelope in which it is proved to have been contained, as a post-mark is generally *primâ facie* evidence not only of the existence of the letter at the date signified by the mark (*x*), but also of its delivery according to the ordinary course of business of the post-office to the person to whom it was addressed (*y*). But in one case it was held that some evidence was requisite that the post-mark was genuine (*z*); and in any case where doubt is thrown upon it, it seems that some evidence should be given by some person who is acquainted with it (*a*).

In regard to deeds, and perhaps some other documents by which property or rights are granted, delivery denotes not merely that actual delivery of the document by the grantor to the grantee (which is the most emphatic symbol of the grantor's intention that the deed shall forthwith have the effect which it purports to have,) but also any other act done by the grantor, either with or without the presence and consent of the grantee, which indicates the same intention on his part. In the latter case the delivery is only constructive. Thus if the grantor at the time of executing the deed says to any other person, "I deliver this as my act and deed," or says or does anything from which it may be inferred that he has executed the deed with the intention that it shall operate immediately, even though it is not delivered to the grantee

(*w*) *British and American Telegraph Co.* v. *Colson* (1871) L. R. 6 Ex. 108, 122.

(*x*) *Fletcher* v. *Braddyll* (1821) 3 St. 64.

(*y*) *Archangelo* v. *Thompson* (1811) 2 Camp. 620; cf. *Kent* v. *Lowen* (1808) 1 Camp. 177.

(*z*) *R.* v. *Watson* (1808) 1 Camp. 215; cf. *Fletcher* v. *Braddyll* (1821) 3 St. 64.

(*a*) *Abbey* v. *Lill* (1829) 5 Bing. 299.

or anyone on his behalf, but is retained in the custody of the grantor, the delivery will be deemed complete. Delivery in this sense may be proved by the direct evidence of the person who executed the deed or anyone who witnessed him do so; and it may also be inferred from circumstances, as for instance from proof of the genuineness of the signature to it and from its appearing duly sealed and being found in the custody in which it might be expected to be found, assuming that it was in fact delivered according to its tenor or in such other manner as would be natural and proper in the circumstances of the case.

And hence it is said that *primâ facie* affixing the seal imports delivery, though it is otherwise if otherwise intended (*b*). Where a corporation directed their clerk to affix their seal to a conveyance, but not to part with it till accounts had been adjusted between them and the purchaser, the deed was held not to pass the legal estate, as it had never been delivered (*c*), or, in other words it had been delivered merely as an escrow. So where the clerk to a corporation fraudulently affixed the seal to a transfer and appropriated the proceeds of certain stock, it was held that there was no delivery by the corporation, and that they were not bound by the deed and were entitled to have the stock replaced (*e*).

A good example of delivery in the special sense applicable to deeds is to be found in *Roberts* v. *Security Co.* (*f*). There the plaintiff signed and sent to the defendants on the 14th of December, 1895, a proposal for an insurance on household goods against burglary; on the 27th of December a policy

(*b*) Per Wills J. in *Mayor, &c. of the Staple of England* v. *Bank of England* (1887) 21 Q. B. D. at p. 165, quoting Anon. 1 Ventr. 257.

(*c*) *Derby Canal Co.* v. *Willmot* (1808) 9 East, 359.

(*e*) *Mayor, &c. of the Staple of England* v. *The Bank of England* (1887) 21 Q. B. D. 160.

(*f*) [1896] 1 Q. B. 111.

in conformity with the proposal was sealed and signed by two directors and the secretary at a board meeting of the defendant company; but in the meantime on the 26th or 27th of December a burglary causing a loss within the meaning of the policy had occurred, though the company had not heard of it at the time of the sealing and signing of the policy. It was held, notwithstanding that the policy remained with the company and its issue had not been communicated to the plaintiff, that there had been due execution of the policy.

The date of a deed is presumed *primâ facie* as against both parties and third persons to be the date of its delivery (*g*); but this presumption may be displaced by evidence that the deed was not delivered on the date it bears, and it will not then take effect from such date (*h*).

(ii) *Proof by or through Attesting Witnesses.*

Attestation means the signature of a document by some person who is not himself one of the parties to it (*i*), but has beheld its execution by one or more of the parties and signs his own name thereto as a record of that fact, being constituted an official witness, as it were, of such execution (*k*). When a document is attested, it is a common practice to subjoin to the instrument an attestation clause stating that the signing, or the signing sealing and delivery, was done in the presence of the persons whose names are thereunder subscribed as attesting witnesses.

In some cases attestation is made by statute a necessary condition to the valid execution of the document, as in the case of wills, bills of sale, and certain other documents. In

(*g*) *Anderson* v. *Weston* (1840) 6 Bing. N. C. 296, 300, 301; and see p. 372.
(*h*) *Mowatt* v. *Castle Steel and Iron Works Co.* (1886) 34 Ch. D. 58.
(*i*) *Seale* v. *Claridge* (1881) 7 Q. B. D. 516.
(*k*) *R.* v. *Harringworth* (1815) 4 M. & S. 350, 354; *Bowman* v. *Bowman* (1843) 2 M. & R. 501.

other cases, as in that of ordinary deeds, where attestation is not required, it is nevertheless a common practice to attest the execution in order to facilitate its proof at any future time. Before 1851, when parties to the record were first rendered competent as witnesses (*l*), it was usual for every document of importance to be attested, whether the law required it or not, in order to secure a witness who would be competent to prove the document. And at the same time it was a settled rule that no document which was attested, whether voluntarily or compulsorily, could be proved otherwise than by calling the attesting witness or by proof in certain cases of his handwriting, (unless the attestation was voluntary and this special mode of proof was waived), inasmuch as he was considered to have been pre-appointed by the parties for the express purpose of proving the execution of the document. But by section 7 of the Statute 28 Vict. c. 18 it was enacted that—

> It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved, as if there had been no attesting witness thereto (*m*).

The previous practice whereby it was obligatory to prove attested documents by means of the attesting witness, was not thereby prohibited, but only rendered optional in all cases where attestation was not necessary to validity (*n*). Hence the law now stands thus: where by any statute attestation is requisite to the validity of a document, its execution must still (unless some special enactment has in any case otherwise provided) be proved, in accordance with the old common law

(*l*) See p. 128.

(*m*) By virtue of sect. 1, this provision is made applicable to all courts of judicature as well criminal as others. The Common Law Procedure Act of 1854 had contained a similar provision applicable to civil cases only.

(*n*) *In re Mair's Estate* (1873) 42 L. J. Ch. 882.

rule, by or through the attesting witnesses. Where, on the other hand, the attestation is merely voluntary, the party adducing the document in evidence has the option of proving it either by means of the attesting witnesses, or by ordinary witnesses as described in the last sub-section of this Chapter, or by notice to admit, in cases where that process is applicable.

The proof of a document by means of attesting witnesses is governed by the same rules whether the attestation was compulsory or not, and is as follows.

Although two or more attesting witnesses may be necessary to the valid execution of a document, it is in law sufficient to call one alone, provided that he can testify to the observance of all the requisite formalities (*o*). The witness should be able to prove that he saw the document duly executed by the party by whom it purports to have been executed; and for this purpose he may refresh his memory by inspecting his signature (*p*). Where an attesting witness is proved to be dead (*q*), or out of the jurisdiction of the court (*r*), or insane (*s*), or is missing and cannot after honest and diligent inquiry be found (*t*), or is incompetent to testify in the particular proceedings by reason of interest (*u*), it will be sufficient to prove his handwriting. But this must be taken subject to this qualification, that such evidence of his handwriting can only

(*o*) *Wright* v. *Doe* (1834) 1 A. & E. 3, 23; *Forster* v. *Forster* (1864) 33 L. J. P. M. & D. 113.

(*p*) *Maugham* v. *Hubbard* (1828) 8 B. & C. 14, 16; *Whitelocke* v. *Musgrove* (1833) 1 C. & M. 511, 519. See p. 367.

(*q*) *Barnes* v. *Trompowsky* (1797) 7 T. R. 265, 266; *Adam* v. *Kerr* (1798) 1 B. & P. 360; *Prince* v. *Blackburn* (1802) 2 East, 250.

(*r*) *Barnes* v. *Trompowsky* and *Prince* v. *Blackburn*, *supra*; *Glubb* v. *Edwards* (1840) 2 Moo. & Rob. 300; *In re Mair's Estate* (1873) 42 L. J. Ch. 882.

(*s*) *Currie* v. *Child* (1812) 3 Camp. 283.

(*t*) *Crosby* v. *Percy* (1808) 1 Taunt. 364; *Burt* v. *Walker* (1821) 4 B. & A. 697.

(*u*) *Cunliffe* v. *Sefton* (1801) 2 East, 183.

be given where no other attesting witness can be produced (*x*). The handwriting of the witness being thus proved, the attestation clause becomes evidence of everything that is stated in it, as that the document was duly signed, sealed, and delivered in the presence of the attesting witnesses by the party who purports to have so signed, sealed and delivered it (*y*). But if an attesting witness when called, or the attestation clause (in case of his death, &c.), does not identify the person who executed the document with the particular person of the same name who is alleged by the party tendering the document to have executed it, some evidence of identity must of course be given (*z*). On the other hand, as the object of proving an attesting witness's handwriting is to establish his identity, whenever his personal identity is established by other evidence, further evidence as to the identity of his handwriting becomes unnecessary (*a*).

If the genuineness of an attested document is impeached on the ground of forgery or fraud, and it is alleged that deceased attesting witnesses were accomplices therein, evidence is admissible of their good character (*b*).

(iii) *Proof by Notice to Admit.*

This mode of proof is not applicable to criminal proceedings. Nor does it extend even in civil proceedings to the proof of documents which by law require attestation, for reasons which have just been stated; and hence neither the

(*x*) Phill. Ev. 10th ed. 1852, vol. 1, p. 432. For a special exception to this rule, see *Wright* v. *Doe* (1834) 1 A. & E. 3.

(*y*) *Milward* v. *Temple* (1808) 1 Camp. 375; *Whitelocke* v. *Musgrove* (1833) 1 C. & M. 511, 518, 519.

(*z*) *Whitelocke* v. *Musgrove, supra.*

(*a*) *R.* v. *St. Giles* (1853) 1 E. & B. 642.

(*b*) *Doe* v. *Stephenson* (1801) 3 Esp. 284; *Doe* v. *Walker*, 4 *ibid.* 50; *Durham* v. *Beaumont* (1808) 1 Camp. 207, 210; *Provis* v. *Reed* (1829) 5 Bing. N. S. 435; cf. p. 367 above.

prescribed form of the notice nor the rules contain any reference to attestation. Rule 2 of Order XXXII provides that—

> Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the cause or matter may be, unless at the trial or hearing the court or a judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense.

The reservation "saving all just exceptions" imports that the admission which is asked is required only in order to dispense with the proof necessary for the adduction of the document in evidence, if otherwise admissible. The party giving the admission will remain entitled to object that it is not relevant, or that it is not an admissible medium of proof of the fact which is sought to be proved by it. This is further made clear by the prescribed form of the notice to admit which is set out in Appendix D (*c*).

The Order does not define in what cases a refusal to admit would be reasonable, but in the case of documents of which the opponent is not likely to have had any previous cognizance, it must obviously be in most cases of little use to endeavour to extract the admission, not to mention the disadvantage which may sometimes accrue from making a voluntary discovery. Thus in an action by a lord of a manor to recover a piece of the waste of the manor which has been trespassed upon and occupied by a squatter, there is generally nothing to be gained by the plaintiff submitting his title deeds to the defendant's inspection and asking for an admission of them.

Subject to this qualification, the notice to admit is intended, as an examination of the form of it will show (*c*), to secure admissions with regard both to original documents in the

(*c*) See p. 481.

possession of the party serving the notice, and to original documents not in his possession but of which he has copies. (The admissions asked as to the copies themselves will be referred to in the Chapter on secondary evidence (*e*).) With regard to originals in the party's possession the notice requires an admission that they were written, signed or executed as they purport respectively to have been. Such an admission covers the whole proof of a document for which attestation is not requisite, as the term "execution" denotes sealing and delivery (*f*). With regard to original documents of which the party has only got copies, the notice requires an admission that the originals were served, sent or delivered respectively as stated in the notice. It appears to be assumed with regard to any private document which is likely to be comprised in this part of the notice either that such admission will cover the writing, signing and sealing of it, as the case may be, by reason of the terms in which the document is described, or that the party serving the notice will be able to prove these particular facts and will only require an admission as to the serving, sending or delivering of it.

§ 3. Proof of Document when Ancient.

The production in court of ancient private documents is governed by the rules stated in the first section of this chapter; but their proof, when so produced, is facilitated by certain special rules, the subject of this section. And as the date of a document is presumed *primâ facie* to be correct, a document which appears from its date to be thirty years old or more, is deemed an ancient document unless the contrary is proved (*g*).

The general rule is this, that an ancient document proves

(*e*) See p. 404.

(*f*) Williams' Real Property, 20th ed. 1906, p. 151.

(*g*) *Anderson* v. *Weston* (1840) 6 Bing. N. C. 296, 301.

itself (*h*), or in other words it is presumed that it was written, signed, sealed, delivered, attested, and stamped, as the case may be, by the persons, in the mode, and at the time and place, that it purports to have been, provided always that it is produced from proper custody, and that the appearance of it when inspected is not inconsistent with its authenticity (*i*). But inasmuch as the proof of a document always involves the identification of the parties to it (*k*), the rule must be understood subject to this, that if an ancient document does not itself state or otherwise identify the names or characters of the parties to it, some sort of evidence will be necessary before it will be admissible. If for instance in order to prove the receipt of tolls, books are tendered in evidence alleged to be books of deceased receivers of the tolls, it will be necessary, if the books themselves do not show it, to give some evidence that they were kept by such receivers as alleged (*l*). On these conditions being fulfilled an ancient document becomes admissible in evidence, although its whole effect may be afterwards displaced by other evidence adduced to show that it was cancelled after execution, or that it never was in fact duly executed, or even that it was a forgery.

The ground of the rule is the great difficulty, indeed in many cases the impossibility, of proving the execution and attestation of documents in the ordinary way after the lapse of many years (*m*). Hence in the case of a will the period of thirty years is reckoned not from the testator's

(*h*) As to this expression see *Doe* v. *Burdett* (1835) 4 A. & E. 1, 19. Another form in which the rule is stated is to say that execution is presumed or need not be proved. But the statement in the text appears to be the more correct, inasmuch as the presumption extends to other particulars besides execution, strictly so called, as, for instance, attestation and stamping.

(*i*) *Meath* v. *Winchester* (1836) 3 Bing. N. C. 183, 200.

(*k*) See pp. 371, 372.

(*l*) *Doe* v. *Thynne* (1808) 10 East, 206; see above, p. 367.

(*m*) *Wynne* v. *Tyrwhitt* (1821) 4 B. & A. 376; *Andrews* v. *Motley* (1862) 32 L. J. C. P. 128, 131.

death, but from the date of execution of the instrument (*n*). And the fact that the evidence thus dispensed with could in fact be adduced, as where for instance the attesting witnesses are still living, does not preclude the operation of the rule (*o*). The rule is of general application (*p*), and the cases illustrate it in connection with many different kinds of documents, including settlements (*q*), wills (*r*), bonds (*s*), memorials (*ss*), leases (*t*), agreements (*u*), cases stated for counsel's opinion (*x*), stewards' books containing entries of the receipt of rents (*y*), and letters (*z*).

(i) *Custody.*—This condition of admissibility must be proved by some evidence (*a*). Proper custody does not necessarily mean the most appropriate custody, the custody of the person entitled in law to hold the document, but either that or any other custody which in the circumstances of the case appear to the court to be consistent with its genuineness (*b*).

The cases present among others the following examples of documents held admissible as coming from proper custody, namely, a deed creating a long term produced by one who was solicitor both to the administrator of the termee and to certain of the persons beneficially interested under it (*c*); an expired lease produced from the custody of the agent of a

(*n*) *Doe* v. *Wolley* (1828) 8 B. & C. 22.
(*o*) *Doe* v. *Burdett* (1835) 4 A. & E. 1, 19.
(*p*) *Wynne* v. *Tyrwhitt* (1821) 4 B. & A. 376.
(*q*) *Doe* v. *Samples* (1838) 8 A. & E. 151.
(*r*) *Doe* v. *Wolley* (1828) 8 B. & C. 22; *Doe* v. *Burdett* (1835) 4 A. & E. 1; *Andrews* v. *Motley* (1862) 32 L. J. C. P. 128.
(*s*) *Chelsea Waterworks* v. *Cowper* (1795) 1 Esp. 275.
(*ss*) *Riggs-Miller* v. *Wheatley* (1890) 28 L. R. 144.
(*t*) *Plaxton* v. *Dare* (1829) 10 B. & C. 17.
(*u*) *Mytton* v. *Thornbury* (1860) 29 L. J. M. C. 109.
(*x*) *Meath* v. *Winchester* (1836) 3 Bing. N. C. 183.
(*y*) *Wynne* v. *Tyrwhitt* (1821) 4 B. & A. 376.
(*z*) *Doe* v. *Beynon* (1840) 12 A. & E. 431.
(*a*) *Earl* v. *Lewis* (1801) 4 Esp. 1; *Evans* v. *Rees* (1839) 10 A. & E. 151.
(*b*) *Doe* v. *Phillips* (1845) 8 Q. B. 158; *Doe* v. *Keeling* (1848) 11 Q. B. 884.
(*c*) *Doe* v. *Phillips* (1845) 8 Q. B. 158.

successor in title of the lessor (*d*); a will produced by a tenant for life claiming title under it (*e*); a settlement produced by an equitable tenant for life claiming under it (*f*); a case with counsel's opinion thereon, stated and given on behalf of a bishop of Meath as to the right to an advowson, produced from the custody of the bishop's descendants who were not successors in title to the advowson (*g*); and an agreement between certain inhabitants of a parish and the owner of an estate within it for the separate maintenance by the latter of the poor upon his estate, produced from the custody of a large landowner in the parish, though not a successor in title or descendant of any of the parties to the agreement (*h*).

(ii) *Apparent Regularity.*—If there is anything on the face of the document inconsistent with its authenticity it will be inadmissible, unless evidence can be adduced to explain the matter and remove the doubt. But there are few good examples in the books of the discussion of this condition of admissibility, and it is obvious that its application must vary in every instance. In a case where a deed about thirty-six years old purported to have been sealed and delivered "being first duly stamped," and there were marks as of a stamp having been once impressed and afterwards obliterated, the court held that, although no evidence had been given to account for the state of the document, the judge at the trial had been justified in holding it to have been duly stamped and admitting it in evidence (*i*).

(*d*) *Doe* v. *Keeling* (1848) 11 Q. B. 884.
(*e*) *Andrews* v. *Motley* (1862) 32 L. J. C. P. 128.
(*f*) *Doe* v. *Samples* (1838) 8 A. & E. 151.
(*g*) *Bishop of Meath* v. *Mayor of Winchester* (1836) 3 Bing. N. C. 183.
(*h*) *Mytton* v. *Thornbury* (1860) 29 L. J. M. C. 109.
(*i*) *Doe* v. *Coombs* (1842) 3 Q. B. 686.

CHAPTER V.

STAMPS.

The last Chapter stated what was necessary to the proof of an original private document when produced in court. But many documents are also required, in the interests of the revenue, to be stamped at the time of execution, and in default thereof are either wholly inadmissible or only admissible on the payment of penalties.

The stamping of documents is now regulated almost entirely (*a*) by the Stamp Act, 1891, 54 & 55 Vict. c. 39, which repeals most of the previous enactments (*b*), and contains in its first schedule a list of documents which require to be stamped and the amounts of the duty payable in each case.

The proper time for the stamping of a document which requires stamping is at or before its execution. This is implied by the terms of sect. 15 (1) of the Act, which is as follows:—

> Save where other express provision is in this Act made, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty and a penalty of 10*l.*, and also by way of further penalty, where the unpaid duty exceeds 10*l.*, of interest on such duty, at the rate of 5*l.* per cent. per annum, from the day upon which the instrument was first executed up to the time when the amount of interest is equal to the unpaid duty.

(*a*) Some minor amendments have been enacted by the Customs and Inland Revenue Act, 1893, and the Annual Finance Acts from 1894 to 1902, and that of 1905.

(*b*) Sect. 123. But the Act is not retrospective; see sects. 1 and 14 (4); *Clarke* v. *Roche* (1877) 3 Q. B. D. 170.

With regard however to certain classes of instruments it is enacted that they may be stamped within a certain period after execution without incurring any penalty. Thus bonds, covenants, conveyances on sale, leases, mortgages, debentures and settlements, chargeable with *ad valorem* duty, may be stamped within 30 days after execution; but after the lapse of that period they can only be stamped subject to the payment of a fine and heavy penalties, unless a reasonable excuse can be given for the delay (*c*).

Again most unstamped or insufficiently stamped instruments which have been first executed at any place out of the United Kingdom may be stamped at any time within 30 days after they have been first received in the United Kingdom on payment of the unpaid duty only (*d*); after which period they can only be stamped subject to the penalties mentioned in section 15 (1) above. But this particular period is not allowed in the case of all documents. Nor is it always permissible, where a period of delay is allowed, to stamp an instrument which has been first executed out of the United Kingdom after the prescribed period has elapsed subject merely to the payment of penalties. Thus a sea insurance executed abroad, but enforceable in the United Kingdom, can only be stamped within 10 days after its receipt within the United Kingdom; after the lapse of that period it cannot be stamped at all except for the purpose of production in evidence and then only on payment of a penalty of £100 (*e*).

Again, bills of exchange and promissory notes cannot be stamped after execution except in certain specified cases (*f*),

(*c*) Sect. 15 (2).

(*d*) Sect. 15 (3).

(*e*) Sect. 95.

(*f*) Sects. 34—38. "Bill of exchange" includes "draft, order, cheque, letter of credit," and certain other documents: see sect. 32. Promissory note is defined by sect. 33 to include any document or writing (except a bank note) containing a promise to pay any sum of money, and a note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or

and bills of lading (*g*) and proxies and voting papers cannot be stamped after execution in any circumstances (*h*).

The provisions of the Act in respect of penalties must however be read subject to section 15 (3) (b), as amended by section 15 of the Finance Act, 1895 (*i*), enacting that the Commissioners may if they think fit at any time after the execution of any instrument mitigate or remit any penalty payable on stamping. This enactment appears to give the Commissioners an unlimited power of remitting penalties according to the particular circumstances of each case; but they have, further, made certain standing regulations with regard to the matter, by which it is provided that agreements under hand only, liable to the fixed duty of sixpence, may be stamped without penalty within 14 days from the date of execution, and a large number of other instruments within 30 days (*j*).

It is not consistent with the scope of this book to set out all the duties contained in the schedule to the Stamp Act, 1891, and in the Amending Acts above referred to (*k*), but it may be convenient to give as illustrations two of the most common examples. Thus a receipt given for or upon the payment of money amounting to £2 or upwards must be stamped with a penny stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands. And every agreement or memorandum of agreement under hand only, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument, must be stamped with a sixpenny stamp, which is to be cancelled by the person by whom the agreement is first

may not be performed or happen, is to be deemed a promissory note for that sum of money.

(*g*) Sect. 40.

(*h*) Sect. 80.

(*i*) 58 Vict. c. 16.

(*j*) See Alpe's Stamp Duties, 10th ed. 1905, p. 42,

(*k*) See p. 387, note (*a*).

executed, except the following agreements which are exempt, namely, any agreement or memorandum (a) the matter whereof is not of the value of £5, (b) for the hire of any labourer, artificer, manufacturer or menial servant, (c) for or relating to the sale of any goods, wares or merchandise, or (d) between the master and mariners of any ship or vessel for wages on any voyage coastwise from port to port in the United Kingdom.

With regard to the production in evidence of documents which require to be stamped, sect. 14 of the Act provides as follows :—

(1) Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee notice shall be taken by the judge, arbitrator, or referee of any omission or insufficiency of the stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the court whose duty it is to read the instrument or to the arbitrator or referee of the amount of the unpaid duty, and the penalty payable on stamping the same, and of a further sum of one pound, be received in evidence, saving all just exceptions on other grounds.

(4) Save as aforesaid an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed.

The duty imposed by this section upon the judge, arbitrator or referee before whom the case is being heard, to take notice of any omission or insufficiency of the stamp on any document tendered in evidence, is imperative. The fact that the opponent of the party tendering it raises no objection (as is now the usual practice where the objection is not fatal to the action, but may be cured on the payment of a penalty), or that he has even agreed that the document shall be given in evidence without any such objection, does

not exonerate the tribunal from the duty of taking notice of it (*l*).

Before the Stamp Act of 1891 the courts in construing the enactments in force from time to time as to the exclusion from evidence of unstamped documents had laid down the principle that the prohibition did not apply where the document was tendered for a collateral purpose, that is, for some purpose other than the primary and direct purpose denoted or implied by the title or description of the document contained in the Act. This principle was before 1854 applied indifferently in criminal and civil cases, but by the Stamp Act of that year (*m*), the numerous distinctions which had arisen in its application to criminal cases were put an end to by the general provision that every instrument liable to stamp duty should be admitted in evidence in any criminal proceedings, although it might not have the stamp required by the law impressed thereon or affixed thereto. The same provision though in different terms appeared in the subsequent Act of 1870 (*n*), and now appears, as set forth above, in that of 1891. In criminal cases therefore an unstamped document is admissible for every purpose.

With regard to civil cases the Acts of 1854 and 1870 made no change in the rule by which an unstamped document was only admissible in evidence if the purpose for which it was tendered was collateral. The most obvious examples of collateral purpose are cases where the document is only produced for the purpose of comparison of handwriting, or merely as a link in a chain of circumstantial evidence, as to prove that a party to the document was at a particular place on a particular date, or where the party tendering the document alleges

(*l*) *Nixon* v. *Albion Marine Insurance Co.* (1867) L. R. 2 Ex. 338; *Bowker* v. *Williamson* (1889) 5 T. L. R. 382; cf. *Lowe* v. *Dorling* (1905) 74 L. J. K. B. 794, per Lord Alverstone C. J. at p. 796. But the Court may permit the hearing to proceed upon the undertaking of the party's solicitor to stamp the document and produce it stamped before the judgment or order is drawn up. See *Re Coolgardie Goldfields* [1900] 1 Ch. 475.

(*m*) 17 & 18 Vict. c. 83 s. 27.

(*n*) 33 & 34 Vict. c. 97 s. 17.

that it was never intended to be a valid instrument and seeks to prove it merely as a step in the commission of a fraud (*o*). Before the Act of 1891 the prohibition against the adduction of unstamped documents in other than criminal proceedings was in these terms, that no such instrument should "except in criminal proceedings, be pleaded or given in evidence or admitted to be good, useful, or available in law or equity" (*p*). But the Act of 1891 provides that no such instrument shall "except in criminal proceedings, be given in evidence or be available for any purpose whatsoever" (*q*). This change in language seems to indicate an intention to prohibit the admissibility of unstamped documents even for collateral purposes, and appears to be moulded on the language used in sect. 54 (1) of the Act of 1870 (*r*) as to bills and notes, which has been held to exclude the adduction of those documents even for collateral purposes (*rr*). It would seem however that if the party tendering the document is not the person responsible for the want of the stamp, and does not approbate it as a valid instrument, but only presents it to the court as a fraud or forgery, it would still be admissible, though unstamped. And it has been decided that notwithstanding the stringent terms of the section, a document that is not properly stamped may be referred to by a witness for the purpose of refreshing his memory (*s*).

Stamp duty is always chargeable on an instrument in accordance with its real character and effect in law, and it is immaterial by what other title the parties may choose to

(*o*) *Gregory* v. *Fraser* (1814) 3 Camp. 454; *Keable* v. *Payne* (1838) 8 A. & E. 555; *R.* v. *Gompertz* (1846) 9 Q. B. 824.

(*p*) See 33 & 34 Vict. c. 97 s. 17, and prior Acts.

(*q*) Sect. 14 (4).

(*r*) 33 & 34 Vict. c. 97.

(*rr*) See as to this section *Ashling* v. *Boon* [1891] 1 Ch. 568, where it was held that an insufficiently stamped promissory note could not be given in evidence as a receipt for the money for which it was given.

(*s*) *Birchall* v. *Bullough* [1896] 1 Q. B. 325. Cf. p. 331 above.

designate it; the substance and not the form of the instrument will be regarded (*t*). But generally speaking if the instrument is duly stamped with reference to its principal object, this stamp covers everything accessory to this object (*u*). The following examples illustrate what is meant by accessory matters, not requiring any stamp in addition to that required for the principal object of the instrument: a lease with an option of purchase of the property demised need only be stamped as a lease and not as an agreement also, the option to purchase being merely ancillary to the main purpose of the document (*x*); and a lease in which a third party joined for the purpose of guaranteeing the payment of the rent was held to be stampable as a lease only and not as a deed also, the covenant of the surety being purely accessory to the lease which was the main purpose of the deed (*y*).

But where a document contains more than one distinct principal matter, a different rule applies. Sect. 4 (a) of the Act is as follows:—

> Except where express provision to the contrary is made by this or any other Act,—
>
> (a) An instrument containing or relating to several distinct matters is to be separately and distinctly charged as if it were a separate instrument with duty in respect of each of the matters:
>
> (b) An instrument made for any consideration in respect whereof it is chargeable with ad valorem duty and also for any further or other valuable consideration or considerations is to be separately and distinctly charged as if it were a separate instrument with duty in respect of each of the considerations.

A lease containing an option to purchase property other than that demised (*z*), and a lease of several estates to several

(*t*) *Hutton* v. *Lippert* (1883) 8 App. Ca. 309; and see case in next note.

(*u*) *Limmer Asphalte Paving Co., Ltd.* v. *Commissioners of Inland Revenue* (1872) L. R. 7 Ex. 211.

(*x*) *Worthington* v. *Warrington* (1848) 5 C. B. 636.

(*y*) *Price* v. *Thomas* (1831) 2 B. & Ad. 218; *S. C.* sub nom. *Pratt* v. *Thomas*, 4 C. & P. 554.

(*z*) *Lovelock* v. *Franklin* (1846) 8 Q. B. 371.

tenants at different rents (*a*), are examples of distinct matters within the meaning of this section. In cases of this kind, where the matters are distinct, but the instrument is in law one, the general rule is that, unless it is sufficiently stamped to cover both matters, it cannot be given in evidence in respect of either. But the rule is otherwise where, though the document is physically one, it contains really two independent instruments, as, for example, a statement of account between two parties at the foot of which is a receipt for money paid (*b*). Here the one part of the document can be given in evidence notwithstanding that the other is inadmissible for want of a stamp.

Where the parties to an executed instrument are in doubt as to whether it is chargeable with duty, or as to the amount of such duty, the Commissioners may be required to express their opinion thereon (*c*).

If a document tendered in evidence bears the proper stamp, the court will presume, in the absence of evidence to the contrary, that it was affixed or impressed at the proper time, and it lies on the objector to prove the contrary (*d*). If the document bears no stamp, but is alleged to have once been duly stamped, it becomes a question of evidence whether it has been duly stamped or not (*e*). Thus, where a deed about thirty-six years old purported to have been sealed and delivered "being first duly stamped," and there were marks as of a stamp having been once impressed though afterwards obliterated, the court held that, although no evidence was given to account for the state of the document, the judge at

(*a*) *Doe* v. *Day* (1811) 13 East, 241. For other examples see Alpe's Stamp Acts, ed. 1891, pp. 3, 16 and 18.

(*b*) *Matheson* v. *Ross* (1849) 2 H. L. C. 286.

(*c*) Sect. 12. For the circular issued by the solicitor of Inland Revenue for the assistance of persons presenting instruments for adjudicating, see Highmore's Stamp Laws, 2nd ed. 1902, p. 57.

(*d*) *Bradlaugh* v. *De Rin* (1868) L. R. 3 C. P. 286.

(*e*) *Marine Investment Co.* v. *Haviside* (1872) L. R. 5 H. L. 624.

the trial was justified in holding it to have been duly stamped and admitting it in evidence (*f*).

It is enacted by Order XXXIX, Rule 8, of the Rules of the Supreme Court that

> A new trial shall not be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp.

And it has been held that this rule applies not only to cases tried in the High Court, whether with or without a jury (*g*), but also on appeals from the County Court (*h*).

The presumptions in regard to the stamping of an original document which is proved by means of secondary evidence are dealt with at a later page (*i*).

(*f*) *Doe* v. *Coombs* (1842) 3 Q. B. 687.
(*g*) *Blewitt* v. *Tritton* [1892] 2 Q. B. 327.
(*h*) *Mander* v. *Ridgway* [1898] 1 Q. B. 501; cf. *Lowe* v. *Dorling* (1905) 74 L. J. K. B. 794.
(*i*) See p. 406.

CHAPTER VI.

SECONDARY EVIDENCE OF PRIVATE DOCUMENTS.

§ 1. *Events in which Secondary Evidence is admissible:*
(i) *Loss or Destruction of Original.*
(ii) *Irremovability of Original.*
(iii) *Original out of Jurisdiction.*
(iv) *Lawful Non-production by Third Person.*
(v) *Non-compliance with Notice to Produce.*
§ 2. *Species of Secondary Evidence.*
§ 3. *Presumptions as to the Original.*

A PARTY who desires to put a document in evidence is bound, as stated in the last chapter but one, whenever it is possible, to produce, or procure the production of, the original in court. Should this be impossible, the law permits him in most cases to give other evidence, called Secondary Evidence, of its contents, provided always that the original if produced would itself have been admissible (*z*). This is allowed on the principle that when a party has taken all reasonable means, without success, to procure the production of the original, it is right that he should be permitted to resort to other evidence (*a*).

For the purpose of this rule the distinction must be borne in mind between instruments executed in duplicate, where the document retained by each party is executed by them both, and instruments executed in counterparts, where the document retained by each party is executed by the other party only. Where an instrument is executed in duplicate or triplicate, all the parts are originals, and the non-produc-

(*z*) Cf. pp. 285, 292, 297 above.

(*a*) *Doe* v. *Ross* (1840) 7 M. & W. 102; *Boyle* v. *Wiseman* (1855) 10 Ex. 647, 649.

tion of all of them must be accounted for before secondary evidence can be given of the contents (*b*). In the case of an instrument executed in counterpart, each part is an original with reference to any question of the estate granted or the liability undertaken, as the case may be, by the party who executed that particular part, and is secondary evidence only of any grant or obligation by the party who has not signed it. But by a convenient exception, allowed at any rate in the case of deeds, a party may tender in evidence the part signed by his opponent in order to prove the contents of the other part of the document. Thus A sued his lessee for possession of the demised premises, forfeited for breach of covenant, but omitted to give the defendant notice to produce the original lease to prove his right of re-entry; it was ruled that he was entitled to put in his own counterpart for this purpose, on the ground that the defendant thereby under his seal recited that he was bound by the proviso for re-entry (*c*).

§ 1. Events in which Secondary Evidence is admissible.

(i) *Loss or Destruction of Original.*—Secondary evidence is admissible whenever the original is lost or destroyed, and it is immaterial for this purpose by whose agency this has happened (*d*). If no one can be called who witnessed its actual destruction, it is necessary to give evidence from which the judge may reasonably infer its loss or destruction. There is a great difference in this respect between valuable and valueless documents. It is a fair presumption that a man

(*b*) *Alivon* v. *Furnival* (1834) 1 C. M. & R. 277, at p. 292.

(*c*) *Roe* v. *Davis* (1806) 7 East, 363; cf. *Burleigh* v. *Stibbs* (1793) 5 T. R. 465, a like decision as to a deed of apprenticeship. These cases were approved of in *Paul* v. *Meek* (1828) 2 Y. & J. 116.

(*d*) *Kensington* v. *Inglis* (1807) 8 East, 273, 277—280; *Doe* v. *Ross* (1840) 7 M. & W. 102, 122; *Rainy* v. *Bravo* (1872) L. R. 4 P. C. 287; cf. *R.* v. *Castleton* (1799) 6 T. R. 236; *Munn* v. *Godbold* (1825) 3 Bing. 292.

will keep all documents which may with any degree of probability be of present or future value to him, and that he will on the other hand throw away or destroy those which have served their end and are never likely to be required for any purpose whatever. In the former case it is reasonable to exact proof of very careful search, whereas in the latter very slight evidence tending to show loss or destruction will suffice (*e*). What is a proper search and inquiry must always depend on the particular circumstances of the case. Whenever a document might not improperly be kept in the custody of any one of several persons, the search should be extended accordingly. On this preliminary question of search the judge may in his discretion admit evidence of the statements of persons not called, which would be excluded if tendered as evidence of the facts in issue (*f*).

(ii) *Irremovability of the Original.*—Secondary evidence is also admissible where the original is not practically removable, as in the case of writings or placards upon walls, hoardings or notice-boards, and inscriptions on monuments and tombstones (*g*).

(iii) *Original out of the Jurisdiction.*—Also where the original is in the custody of a person out of the jurisdiction, who is not permitted by the law or usage of the place where he is to allow its removal. A charter-party made and signed by the parties in a notary's book in Java in accordance with the law of that island, and by that law not removable, was held to be provable by secondary evidence (*h*). A copy of an agreement of reference made in France according to

(*e*) *Brewster* v. *Sewell* (1820) 3 B. & A. 296.

(*f*) *R.* v. *Kenilworth* (1845) 7 Q. B. 642; *R.* v. *Braintree* (1858) 28 L. J. M. C. 1.

(*g*) *Mortimer* v. *McCallan* (1840) 6 M. & W. 58, 68; *Bruce* v. *Nicolopulo* (1855) 11 Ex. 129, 133; cf. *Bartholomew* v. *Stephens* (1839) 8 C. & P. 728, and examples there referred to; and contrast with *Jones* v. *Tarleton* (1842) 9 M. & W. 675.

(*h*) *Brown* v. *Thornton* (1837) 6 A. & E. 185. The copy tendered was not authenticated by any witness who had examined it with the original, but

French law, deposited with a French notary, and by the legal practice there not removable from that custody, was held to be provable here by an examined copy (*i*). An examined copy of an entry in a register of births kept in a French *Mairie* will be admitted in evidence on proof that the original register cannot be removed from the *Mairie* (*j*).

The first two of these examples relate to documents which by the law of the foreign place were public documents, though English documents of the same character would not be so here; and it has been questioned whether a private document in the lawful private custody of a person out of the jurisdiction may be proved in like manner (*k*). If it may, it is necessary to first prove that a formal demand has been made for the production of the document with a statement of the purpose for which the demand is made (*l*). It would seem that such evidence should be admissible upon the general principle stated at the beginning of this chapter (*m*).

(iv) *Lawful Non-production by a Third Person.*—Secondary evidence is admissible whenever the original is in the possession of a stranger to the proceeding who attends in court with the document and there lawfully refuses to produce it on some ground of privilege claimed by him either in his own right or as agent acting on the instructions of another. The usual and proper course of the party who seeks to give evidence of the document is to compel the attendance in court of the person who has possession of the document by means of a *subpœna duces tecum* (*n*); but if he should voluntarily attend with the document and should lawfully refuse

only by an official seal and signature, which the court could not recognize, and on that ground alone the copy was rejected.

(*i*) *Alivon* v. *Furnival* (1834) 1 C. M. & R. 277.

(*j*) *Burnaby* v. *Baillie* (1889) 42 Ch. D. 282, 291.

(*k*) *Boyle* v. *Wiseman* (1855) 10 Ex. 647.

(*l*) *Ibid.*; and *Crispin* v. *Doglioni* (1863) 32 L. J. P. M. & A. 109.

(*m*) See p. 396.

(*n*) See pp. 362—364.

to produce it, secondary evidence will be equally admissible (*o*). If on the other hand he attends, but without the document, and a *subpœna duces tecum* has not been served on him or not been duly served, this is a fatal objection to the admission of secondary evidence, as the party has not done all that lay in his power to procure the production of the original (*p*). If the person so refusing is merely agent for another by whose instructions the production is withheld, the fact that the principal does so refuse may be proved in several ways. He may himself attend the court upon a subpœna and then and there refuse (*q*), or may attend voluntarily and do the same (*r*); but it will be sufficient for the admission of secondary evidence if the agent himself can prove that he has had express instructions from his principal not to allow the production of the document (*s*). The grounds on which a person is justified in refusing to produce a document are stated under the title of Privilege in Part III, Chapter XIII (*ss*). The principal may of course waive his privilege (*t*), after which the agent's refusal to produce would no longer be lawful, unless based on some independent and just claim of privilege in himself (*u*). Neither principal nor agent thus claiming privilege is compellable to give oral or other secondary evidence of the contents of the privileged document, but if such evidence is voluntarily given it is admissible, even though it is given by an agent without the authority of his principal (*x*). Any other person however who by oral or other secondary evidence can prove the contents of

(*o*) *Doe* v. *Clifford* (1847) 2 C. & K. 448; *Dwyer* v. *Collins* (1852) 7 Ex. 639.
(*p*) *Hibberd* v. *Knight* (1848) 2 Ex. 11.
(*q*) *Newton* v. *Chaplin* (1850) 10 C. B. 356.
(*r*) Cf. *Doe* v. *Clifford* (1847) 2 C. & K. 448.
(*s*) *Phelps* v. *Prew* (1854) 3 E. & B. 430.
(*ss*) See pp. 269—307.
(*t*) *Merle* v. *More* (1826) Ry. & M. 390.
(*u*) *Doe* v. *Ross* (1840) 7 M. & W. 102.
(*x*) *Marston* v. *Downes* (1834) 6 C. & P. 381; and (on motion to the court) 1 A. & E. 31; cf. *Hibberd* v. *Knight* (1848) 2 Ex. 11.

the privileged document may be called to do so (*y*), and to enable him to identify it for this purpose the person withholding production of it may be compelled to produce it for the purpose of identification, provided always that no part of the contents is disclosed. In the case of deeds and wills identification can generally be effected by an inspection of the indorsement containing particulars of the instrument (*z*).

When production is unlawfully refused, no secondary evidence is admissible. The only remedies of the party whom such refusal affects are an application to postpone the trial (with a view to obtaining other evidence or procuring the refusal to be withdrawn) (*a*) and proceedings upon the writ of subpœna (*b*).

(v) *Non-compliance with Notice to Produce.* — Lastly, secondary evidence is admissible whenever the original, being in the possession or under the control of the opposite party to the proceeding, is withheld after a notice has been duly served upon him or his solicitor in the suit to produce it at the trial. The term "opposite parties" does not ordinarily include co-defendants, but only parties between whom there is some question to be determined (*c*). Secondary evidence will not be admissible under this head unless the party serving the notice can prove that at the time of the service of the notice the original was in the possession or power of his opponent (*d*). In civil actions the process of discovery and

(*y*) *Mills* v. *Oddy* (1834) 6 C. & P. 728, 732; *Calcraft* v. *Guest* [1898] 1 Q. B. 759; and cf. pp. 285, 297, above.

(*z*) *Phelps* v. *Prew* (1854) 3 E. & B. 430; *Doe* v. *Clifford* (1847) 2 C. & K. 448.

(*a*) There is a wide power to do this in civil cases; see Rules of Supreme Court, Order XXXVI r. 34; and County Court Rules, 1903, Order XV r. 1; Order XVIII r. 9. As to the postponement of a criminal trial, however, see Archbold's Crim. Pleading, 23rd ed. 1905, pp. 123, 213.

(*b*) See pp. 309—311.

(*c*) *Shaw* v. *Smith* (1886) 18 Q. B. D. 193; cf. *Eden* v. *Weardale Iron and Coal Co.* (1887) 35 Ch. D. 287.

(*d*) *Harvey* v. *Mitchell* (1841) 2 M. & R. 366.

inspection affords a means of procuring this information (*e*). But when discovery has not been obtained, and in criminal cases where no such process is available, other evidence must be resorted to, as, for example, that the document was last seen in the opposite party's possession, or evidence of circumstances from which such possession may reasonably be inferred. Thus, in a case where the plaintiff sought to give secondary evidence of a certificate of the defendant's bankruptcy, it being proved that the defendant had instructed his solicitors to obtain a certificate in circumstances in which he would be entitled to it, and some evidence having been given that a certificate had been granted, the judge inferred that it had come to the defendant's possession (*f*). But the original need not be shown to be in the actual possession of the party, if it is in the custody of any other person who holds it for him and on his behalf without any adverse or independent claim (*g*). Thus a notice to produce has been held to bind the opposite party to produce documents in the hands of his solicitor (*h*), cheques in the possession of his bankers (*i*), an order delivered by him to the captain of his vessel for delivery to a third person of goods on board of her (*k*), and, in an action of trover against a sheriff for illegal levy of the plaintiff's goods, the warrant of execution which had been returned to the hands of the undersheriff (*l*). But where the plaintiff called for a building contract between the defendant and another, which had

(*e*) See pp. 361—362 above.

(*f*) *Henry* v. *Leigh* (1813) 3 Camp. 499.

(*g*) *Evans* v. *Sweet* (1824) Ry. & M. 83; *Parry* v. *Morrit* (1833) 1 M. & R. 279; *Irwin* v. *Lever* (1860) 2 F. & F. 297; compare the decisions as to production of documents under process of discovery; see Peile on Discovery, 1883, p. 133.

(*h*) *Irwin* v. *Lever* (1860) 2 F. & F. 296.

(*i*) *Partridge* v. *Coates* (1824) Ry. & M. 153, 156; *Burton* v. *Payne* (1827) 2 C. & P. 520.

(*k*) *Baldney* v. *Ritchie* (1816) 1 St. 338.

(*l*) *Taplin* v. *Atty* (1825) 3 Bing. 164.

been deposited with a third party to hold on behalf of the two contracting parties (*m*), and in another case, where the plaintiff sought to give in evidence the terms of a written authority under which defendant had acted but which was retained by his principal (*n*), it was ruled that notice to produce was insufficient; the actual holder of the document should have been served with a *subpœna duces tecum*.

The requisites of a notice to produce in reference to time of delivery and form have been already stated above (*o*).

In order to prove the service of the notice to produce, it is not necessary to serve a further notice to produce the original notice; the clerk who is called to prove the service, may give in evidence a copy.

By the common law, when a party called on at the hearing to produce a document which he has had notice to produce refuses such production, he is not afterwards entitled, without the leave of the court, to give the document in evidence for any purpose (*p*).

And on the same principle it is enacted by Rule 15 of Order XXXI as follows:

Every party to a cause or matter shall be entitled, at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the court or judge shall deem sufficient for not complying with such notice, in which case the court or judge may allow the same to be put in evidence on such terms as to costs and otherwise as the court or judge shall think fit.

(*m*) *Parry* v. *Morrit* (1833) 1 M. & R. 279.

(*n*) *Evans* v. *Sweet* (1824) Ry. & M. 83.

(*o*) See pp. 359, 360, above.

(*p*) *Doe* v. *Hodgson* (1840) 12 A. & E. 135; *Collins* v. *Gashon* (1860) 2 F. & F. 47; cf. p. 361 above.

Order XVI r. 13 of the County Court Rules, 1903 and 1904, contains a provision in like terms as to the documents referred to in a party's "particulars, notices, or affidavits."

§ 2. Species of Secondary Evidence.

The law recognizes no degrees in secondary evidence. If the original is not produced for any of the causes above stated, parol evidence may always be given of its contents. If indeed the party giving such parol evidence appears to have better secondary evidence in his power, which he does not produce, that is a fact to go to the jury, from which, if unexplained, they may infer that the evidence kept back would be adverse to the party withholding it. But the law makes no distinction between one class of secondary evidence and another (*q*).

The most satisfactory secondary evidence however which in fact a party can adduce is an accurate copy.

In a civil action if the document is in the possession of an opponent, a copy of it can be obtained by means of the process of discovery and inspection as already mentioned (*r*), and the party can then by means of a notice to admit call on his opponent to admit that the copy is a true copy of the original document and so save himself the trouble and cost of calling evidence to prove its accuracy (*s*). And whenever a party in a civil cause already has in his possession a copy of a document and it is reasonable to call on his opponent to admit that the copy is a true copy, he can call on him to make such admission (*t*). Where however this procedure is not resorted to, or where no admission is given, and also in all criminal proceedings, in which discovery inspection and

(*q*) *Doe* v. *Ross* (1840) 7 M. & W. 102, 106.

(*r*) See pp. 361, 362.

(*s*) See the form of Notice to Admit, p. 481.

(*t*) As to when it is reasonable to serve a notice to admit, and the result of an unreasonable refusal to make the admission asked for, see pp. 381—383.

notice to admit have no place, the party must give such secondary evidence as may be within his power without the aid of this special procedure.

Such secondary evidence may take the form either of a copy proved by a witness to have been made from, or compared with, the original document; or of oral evidence of its contents based on the witness's recollection; or any admission binding on his opponent, as, for example, the statement of his counsel in open court on a former trial of the action as to the contents of the document (*w*); or an entry made by a deceased clerk in the course of his duty as to its contents (*x*); in short, any one of the Media of Proof mentioned in Part III which may be applicable to the case. Moreover, in one case at least, that of wills, a special medium of proof is admitted; for whenever a question arises as to the contents of a will which has been lost or destroyed, evidence may be given of declarations of the testator made before the alleged date of its execution, with regard to the intentions he had formed or the dispositions he had made (*y*).

§ 3. Presumptions as to the Original.

It has been already stated that secondary evidence is only admissible where the original document, if produced, would have been admissible. It does not however follow that every particular which would have been necessary to the admission of the original must therefore in all cases be proved before any secondary evidence can be given. The admissibility of the original is in some cases aided by presumptions made in its favour.

Thus where a party tenders secondary evidence of a docu-

(*w*) *Doe* v. *Ross* (1840) 7 M. & W. 102.

(*x*) *Pritt* v. *Fairclough* (1812) 3 Camp. 305; see above, p. 367.

(*y*) *Johnson* v. *Lyford* (1868) L. R. 1 P. & D. 546; *Sugden* v. *Lord St. Leonards* (1876) 1 P. D. 154; see above, p. 368; and cf. pp. 372, 373.

ment which his opponent has refused to produce, upon the former giving some evidence of the execution of the original, a presumption arises that it was duly attested, if attestation was required (*z*), and that it was duly stamped (*a*); and it lies on his opponent, if he contends the contrary, to make out his objection. Similarly in the case of a document lost or destroyed, after some reasonable evidence of the execution and of the loss or destruction of the original, it will be presumed in favour of the party tendering the secondary evidence, until the contrary is shown, that the document was duly attested (*b*) and stamped (*c*). But when once evidence is given of the absence of the stamp the onus is shifted, and the question must be left to the jury upon the evidence given on the one side and the other.

There seems to be no reason why like presumptions should not be made in the case of documents lawfully withheld either by a person out of the jurisdiction, or by a person within the jurisdiction making a well-founded claim of privilege.

(*z*) *Cooke* v. *Tanswell* (1818) 8 Taunt. 450; *Poole* v. *Warren* (1838) 8 A. & E. 582.

(*a*) *Crisp* v. *Anderson* (1815), 1 St. 35.

(*b*) *R. v. St. Giles* (1853) 1 E. & B. 642.

(*c*) *Marine Investment Co.* v. *Haviside* (1872) L. R. 5 H. L. 624.

CHAPTER VII.

PUBLIC DOCUMENTS.

It has already been stated that the term Public Document is used in two different senses, one having reference to their effect in evidence as a form of testimony or medium of proof, the other having reference only to the mode of their adduction; and it was pointed out that while some so-called public documents (as for example the probate of a will) stand only on the same footing as private documents (as for instance a conveyance) so far as their probative force is concerned, all descriptions of public documents have this characteristic, that they are kept in some special custody and are provable by means of a copy without the production of the original (*a*). This chapter is concerned with the mode of proof of public documents without regard to the effect of their contents in evidence, which has been already dealt with in Chapter XI of Part III.

At common law when a document was of such a character that its preservation and settled custody was of concern to the public at large or to a considerable section of the public, the production of the original was generally either excused or disapproved of by the court, and the document was admitted to proof by means of a copy. Thus it was laid down that the proper mode of proving entries in the books of the Bank of England, which are of great public concern, was by means of copies (*c*); and the books of ancient corpora-

(*a*) See p. 235.
(*c*) *Mortimer* v. *McCallan* (1840) 6 M. & W. 58.

tions and of manorial courts were allowed to be proved in the same way (*d*); and in like manner public registers in foreign countries (*e*). The ordinary mode of proof of a public document is by means of an examined copy, that is, a copy taken on behalf of the party, generally by some clerk or other private person, who produces it in the witness-box and proves that he has copied it accurately from, or examined it with, the original and that it is correct (*f*). The cases do not throw much light on the question what evidence if any it is necessary in such case to give of the original, but it seems that whereas judicial notice would be taken of the existence, authenticity and custody of those of wide public importance, established within the jurisdiction of the court, such as the journals of the Houses of Parliament or the books of the Bank of England, and especially of such as are recorded and kept in pursuance of statutory provisions of which the court will take judicial notice, such as land tax assessments (*g*), some evidence would be necessary on these points with regard to documents of less notoriety, such as the rolls of a manor court (*h*). In cases of the latter description the witness who proved the examined copy or some other person would ordinarily give some evidence to verify the original document.

In order to put the admissibility of copies of public documents on a clearer and more settled footing Lord Brougham's Act, 14 & 15 Vict. c. 99, by sect. 14, enacted that—

> Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice or before any person now or hereafter having by law or by consent of parties authority to

(*d*) See App. A, p. 454.

(*e*) See the cases cited at pp. 242 *seq.*

(*f*) *Lynch* v. *Clerke* (1695) 3 Salk. 154; *Reed* v. *Lamb* (1860) 29 L. J. Ex. 452.

(*g*) See p. 452.

(*h*) See p. 454, and cf. p. 20.

hear, receive and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.

The section does not define what is intended by the words "of such a public nature as to be admissible in evidence on its mere production from the proper custody." It has been held that the parish registers of baptisms, marriages and burials which have been kept in pursuance of canon and statute law answer this description (*i*), but it seems doubtful whether it would be held to comprise the rolls of manor courts or the books of old corporations, or any others which ordinarily require some verification as aforesaid.

Before this general Act several statutes had enacted provisions with regard to the proof of particular public documents by means of certified and other copies, but in consequence of the omission of any provisions dispensing with the proof of the genuineness of such copies, the beneficial effect of the enactments was much diminished. In order to remove this inconvenience the statute 8 & 9 Vict. c. 113, by sect. 1, enacted that—

Whenever by any Act now in force or hereafter to be in force any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, bye-law, entry in any register, or other book or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal or either house of parliament or any committee of either house, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective acts made or to be

(*i*) *Re Hall's Estate* (1852) 22 L. J. Ch. 177; *Re Porter's Trusts* (1856) 25 L. J. Ch. 688.

hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence.

The general result of these two statutes seems to be this, that, save where some statutory provision requires some other and special mode of proof, the proof of an examined copy, or the mere production in court of a copy purporting to be certified by a person purporting to have the due custody of the original, will be sufficient *primâ facie* proof of a public document, except in cases where verification of the original was necessary by the common law before an examined copy could be given in evidence.

By some statutes provision is made for the admissibility of copies of public documents of a slightly different character from the examined and certified copies above-mentioned. These are known as office copies and exemplifications. They consist principally of official copies issued from the offices of the courts of justice and authenticated by the seals of such offices. They hardly differ however except in name from the certified copies already mentioned.

Besides those already mentioned, other general enactments of wide-reaching effect are the following:—

Rule 6 of Order XXXVIII provides as follows:—

All examinations, affidavits, declarations, affirmations, and attestations of honour in causes or matters depending in the High Court, and also acknowledgments required for the purpose of enrolling any deed in the Central Office, may be sworn and taken in Scotland or Ireland or the Channel Islands, or in any colony, island, plantation, or place under the dominion of Her Majesty in foreign parts, before any judge, court, notary public, or person lawfully authorized to administer oaths in such country, colony, island, plantation, or place respectively, or before any of Her Majesty's consuls or vice-consuls in any foreign parts out of Her Majesty's dominions; and the judges and other officers of the High Court shall take judicial notice of the seal or signature, as the case may be, of any such court, judge, notary

public (*k*), person, consul, or vice-consul, attached, appended, or subscribed to any such examinations, affidavits, affirmations, attestations of honour, declarations, acknowledgments, or to any other deed or document.

And sect. 6 of the Commissioners for Oaths Act, 1889 (*l*), further provides as follows :—

(1) Every British ambassador, envoy, minister, chargé d'affaires, and secretary of embassy or legation exercising his functions in any foreign country, and every British consul-general, consul, vice-consul, acting consul, pro-consul, and consular agent, exercising his functions in any foreign place, may in that country or place administer any oath and take any affidavit and also do any notarial act which any notary public can do within the United Kingdom; and every oath, affidavit and notarial act administered, sworn, or done by or before any such person shall be as effectual as if duly administered, sworn, or done by or before any lawful authority in any part of the United Kingdom.

(2) Any document purporting to have affixed, impressed, or subscribed thereon or thereto the seal and signature of any person authorized by this section to administer an oath in testimony of any oath, affidavit, or act being administered, taken, or done by or before him shall be admitted in evidence without proof of the seal or signature being the seal or signature of that person or of the official character of that person.

The above enactments dispense in general terms with proof of seal, stamp, signature and proof of official character in regard to a very large number of documents. In addition to the above an immense number of statutes contain similar provisions applicable to particular cases. Among these it may be convenient to mention here those relating to the Central Office (*m*), the several Courts whose jurisdictions are united in the Probate, Divorce and Admiralty (*o*) Division,

(*k*) Cf. *Abbott* v. *Abbott and Godoy* (1860) 29 L. J. P. M. & A. 57.

(*l*) 52 Vict. c. 10.

(*m*) Order LXI rr. 6 and 7.

(*o*) 20 & 21 Vict. c. 77 s. 22; 20 & 21 Vict. c. 85 s. 13; 24 Vict. c. 10 s. 14.

the Bankruptcy Court (*p*), Examiners (*q*), District Registries (*r*), and County Courts (*s*).

Rule 4 of Order XXXVII provides as follows:—

> Office copies of all writs, records, pleadings and documents filed in the High Court of Justice shall be admissible in evidence in all causes and matters and between all persons or parties to the same extent as the original would be admissible.

And Rule 7 of Order LXI provides as follows:—

> All copies, certificates, and other documents appearing to be sealed with a seal of the Central Office shall be presumed to be office copies or certificates or other documents issued from the Central Office, and if duly stamped may be received in evidence, and no signature or other formality, except the sealing with a seal of the Central Office, shall be required for the authentication of any such copy, certificate, or other document.

A large number of public documents, comprising those most frequently in demand for purposes of evidence are set forth in Appendix A. It will be necessary in making use of this Appendix to bear in mind the following observations which flow directly from the method which has been followed in constructing it.

OBSERVATIONS

REGARDING THE USE OF APPENDIX A.

1. In most cases no reference is made in the First Column of the Appendix to the Statutes 8 & 9 Vict. c. 113 s. 1 and 14 & 15 Vict. c. 99 s. 14 set out in this Chapter (*t*). In the case of most of the public documents mentioned in the Appendix the particular statutes there cited provide for the particular mode of proof; in some cases however the two

(*p*) 46 & 47 Vict. c. 52 s. 137.
(*q*) Order XXXVII, Rule 18.
(*r*) Judicature Act, 1873, s. 61.
(*s*) 51 & 52 Vict. c. 43 s. 180.
(*t*) See pp. 408—410.

statutes above mentioned may also be applicable, and they must therefore always be borne in mind.

2. In the Third Column of the Appendix the words "copy," "office copy," "certified copy," "authorized," "signed," "sealed," "stamped," "printed," "published," &c., must be read as if the words "purporting to be" were in each case inserted before them. No evidence, nor anything but the production of the copy or other document specified, is required to prove the document except where it is so stated.

3. In the same column wherever the words "examined copy," "verified," "proved," &c., are used, evidence will be necessary to prove the examination, verification, &c., accordingly.

4. In many cases some evidence will be necessary to identify the person, property, &c., to which the public document relates; but it has not been thought necessary to repeat this statement throughout the Appendix.

5. The production of the original is not mentioned in the Appendix as one of the modes of proof, save in a few cases which seem to call for special notice. The reason is that the copies mentioned in the third column provide as a rule the cheapest and most convenient mode of proof. There is in most cases nothing in law to prevent a party from procuring the attendance of the official who has charge of the public document by means of a *subpœna duces tecum* or, in the case of an officer of the High Court, by means of an order of the Master (*u*), or in some cases by mere request; but, save where some question arises which can only be solved by production of the original, such a mode of proof would ordinarily be adjudged unreasonable.

6. In most cases the public document is only *primâ facie* evidence of the facts which are provable by it, whether this be expressly so enacted or not; but it seemed convenient not to burden the schedule with any statements on this point.

(*u*) See Rules 28 and 29 of Order LXI.

Part V.

MIS-TRIAL AND FALSE EVIDENCE.

§ 1. *Mis-trial.*
§ 2. *False Evidence.*

§ 1. Mis-trial.

Where in civil cases the trial has ended in a decision on the facts which is contrary to the truth, or has been obtained unfairly, the decision can generally be set aside. There are many grounds on which this may be done, of which however only the principal need here be mentioned.

The judge at the trial of an action cannot after the case has been opened on behalf of the plaintiff give judgment against him without his consent and without hearing the evidence tendered by him, but is bound to hear the evidence in support of his case (*a*). After hearing the evidence for the plaintiff it is for the judge to decide whether any facts have been established by evidence from which the liability of a defendant (whether for negligence, breach of contract, or whatever the alleged cause of action may be) *can* be reasonably inferred; and, if the judge should hold that such facts have been established, it is then for the jury to decide whether

(*a*) *Fletcher* v. *L. & N. W. R. Co.* [1892] 1 Q. B. 132; followed in *Izaacs* v. *Evans* (1900) 16 T. L. R. 480. For the term "non-suit" in these cases should be substituted "judgment for the defendant": *Fox* v. *Star Newspaper Co., Ltd.* [1900] A. C. 19.

the liability in question *ought* to be inferred as a matter of fact (*b*). If the judge should wrongly hold that there is no case to go to the jury and should withdraw it from them, a new trial will be ordered (*c*) ; and if on the other hand the judge should wrongly decide that there is a case to go to the jury and they should find a verdict for the plaintiff, this verdict will be set aside (*d*).

Assuming that there is evidence for the jury and that the case is left to them, the parties are entitled to have a proper and complete direction to the jury upon the law and as to the evidence applicable to the issues (*e*) ; but in order that a party may successfully apply afterwards for a new trial on the ground of misdirection or non-direction, he must be in a position to show that he did not stand by at the trial, but raised a proper objection then and asked the judge to give the direction which ought to have been given (*f*) ; and the same rule applies with regard to the submission of the right questions to the jury (*g*). In the same way a new trial can be had where the judge has erroneously rejected evidence which should have been admitted or received evidence which should have been disallowed, provided that the evidence rejected was formally tendered (*h*) and that the evidence improperly received was formally objected to. But these three grounds of complaint against a verdict are all subject to Rule 6 of Order XXXIX, which provides as follows :—

A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, or because the verdict

(*b*) *Met. R. Co.* v. *Jackson* (1877) 3 A. C. 193, 197.

(*c*) *Brearley* v. *L. & N. W. R. Co.* (1899) 15 T. L. R. 237 ; cf. Judicature Act, 1875, s. 22.

(*d*) *Met. R. Co.* v. *Jackson* (1877) 3 A. C. 193, 197.

(*e*) Judicature Act, 1875, s. 22.

(*f*) *Bray* v. *Ford* [1896] A. C. 44 ; *Nevill* v. *The Fine Art and Gen. Ins. Co.* [1897] A. C. 76.

(*g*) *Seaton* v. *Burnand* [1900] A. C. 135, 143.

(*h*) *Penn* v. *Bibby* (1866) L. R. 2 Ch. 127, 137.

of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial; and if it appear to such court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the court may give final judgment as to part thereof, or some or one only of the parties, and direct a new trial as to the other part only or as to the other party or parties.

And no new trial will be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp (*i*).

A new trial may also be obtained where the verdict is against the weight of the evidence. This rule has been the subject of a good deal of discussion in recent years. It has been laid down that the question whether a new trial should be granted on this ground must depend upon whether the verdict was such as reasonable men *might* have given and not upon whether the learned judge who tried the action was dissatisfied or not with the verdict (*k*). It was pointed out in *Ferrand* v. *Bingley Towchett District Local Board* (*l*) that this rule seems to come very near to the rule stated above (namely, that it is the judge's duty to withdraw the case from the jury where there is no evidence on which reasonable men acting carefully could find for the party upon whom the burden of proof rests); but it was held that the rule is not intended to operate with this degree of strictness. The rule has also been vaguely expressed in these terms, that where the question is one of fact and there is evidence on both sides properly submitted to the jury, the setting aside of their verdict should be of rare and exceptional occurrence (*m*).

(*i*) Order XXXIX, Rule 8.

(*k*) *Solomon* v. *Bitton* (1878) 8 Q. B. D. 176, the report of which is corrected in *Webster* v. *Friedeberg* (1886) 17 Q. B. D. 736; and the *Met. R. Co.* v. *Wright* (1886) 11 A. C. 152.

(*l*) (1892) 8 T. L. R. 70.

(*m*) *The Commissioner of Railways* v. *Brown* (1887) 13 A. C. 133; cf. *Phillips* v. *Martin* (1890) 15 A. C. 193.

The verdict may also be set aside and a new trial granted where the defeated party has been surprised. Surprise in this connection means that a case was made at the trial by his opponent which he could not reasonably be expected to meet (*n*). Similar to this is the case where a new trial is granted on the ground of some mistake in the evidence given, leading to a verdict which would not otherwise have been given (*o*); but it will require a very strong and exceptional case to justify the granting of a new trial in such cases as these.

The procedure to be followed in the High Court for obtaining a new trial is fixed by the following Rules of Order XXXIX:—

3. Every application for a new trial shall be by notice of motion, and no rule *nisi*, order to show cause, or formal proceeding other than such notice of motion shall be made or taken. The notice shall state the grounds of the application, and whether all or part only of the verdict or findings is complained of.

4. The notice of motion shall be a fourteen days' notice, and shall be served within the times following: viz., if the trial has taken place in London or Middlesex, within eight days after the trial; if the trial has taken place elsewhere than in London or Middlesex, within seven days after the last day of sitting on the circuits for England and Wales during which the trial shall have taken place. The time of the vacations shall not be reckoned in the computation of the time for serving the notice of motion.

The obligation to state the grounds of the application is not satisfied by merely stating, for instance, that there has been misdirection or surprise. The notice of motion must give particulars showing in what such misdirection or surprise consisted (*p*). And the same is true of the other grounds of complaint against the verdict above mentioned.

(*n*) *Dillon* v. *City of Cork Steam Packet Co.* (1875) I. R. 9 C. L. 118, 122.

(*o*) *The Germ Milling Co., Ltd.* v. *Robinson* (1886) 3 T. L. R. 71; *Richardson* v. *Fisher* (1823) 1 Bing. 145.

(*p*) *Pfeiffer* v. *Mid. R. Co.* (1886) 18 Q. B. D. 243; *Murfett* v. *Smith* (1887) 12 P. D. 116; *Dow* v. *Dickenson*, W. N. (1881) 52.

An application for new trial in a County Court is governed by Rules 1 and 2 of Order XXXI of the County Court Rules, 1903 and 1904, which are as follows :—

1. An application for a new trial, or to set aside proceedings, may be made and determined on the day of trial, if both parties are present, or such application may be made at the first court held next after the expiration of twelve clear days from such day of trial; provided that the intending applicant shall, seven clear days at least before the holding of such court, deliver to the registrar at his office, and also gives to the opposite party by serving the same personally on such party, or by leaving the same at his residence or place of business, or where the opposite party acts by a solicitor, by serving upon such solicitor in accordance with Order LIV Rule 3 a notice in writing, stating that such an application is intended to be made at such court, and setting forth shortly the grounds of such intended application; but such notice shall not operate as a stay of proceedings unless the judge otherwise orders, and if any money paid into court under any execution or order in the action has not been paid out at the time when such notice in writing is given to the registrar, the registrar shall retain the same to abide the event of such application, or until the judge shall otherwise order; and if no such application is made, the money shall, if required, be paid over to the party in whose favour the order was made, unless the judge otherwise orders; and if such notice is not given in manner aforesaid, or such application is not made at the court mentioned in the notice, no application for a new trial to set aside proceedings shall be subsequently made, unless by leave of the judge, and on such terms as he may think fit; provided that this rule shall not apply to cases falling within the provision of section ninety-one of the Act.

2. The judge may, in his discretion, make it a condition of granting a new trial that it shall take place with a jury, although the former trial did not take place with a jury.

In Criminal Cases (*r*) a new trial can only be obtained when the indictment was either originally preferred in, or else removed by *certiorari* to, the King's Bench Division, and not even then unless the charge is merely one of misdemeanour. Moreover the court will not grant a new trial if the first one has ended in an acquittal, unless that acquittal was obtained by a fraud or unless the prosecution is only intended to test

(*r*) For the statement which follows, see Kenny's Outlines of Criminal Law, p. 491.

some civil right. But in the rare cases where a new trial is thus possible, it may be had not only on grounds of law, as for instance improper rejection of evidence, but even on grounds of fact, as that the verdict was utterly against the evidence or that the principal witness has since been convicted of perjury in the evidence on which the verdict was founded (*s*). But although the scope of new trial is thus limited in criminal cases, the High Court of Justice sitting as the Court for Crown Cases Reserved has power to set aside the conviction of the defendant in a criminal case where a point of law has been reserved on his behalf by the judge at the trial as to misdirection or the misreception or misrejection of evidence; and inasmuch as the common law on this point has not been modified in criminal cases by Rule 6 of Order XXXIX or any similar rule, the court is bound to quash the conviction if the point of law raised by the defendant is sustained, without reference to the question whether the verdict would have been other than it was had the error not been committed (*t*).

§ 2. False Evidence.

(i) *Perjury.*—Any witness who intentionally gives false testimony in the course of a judicial proceeding and relating to some point material to the proceedings is liable to prosecution for perjury. It is however outside the scope of this book to discuss in detail this mode of proceeding in respect of false testimony.

(ii) *Malicious Prosecution and Conspiracy.*—An action for malicious prosecution lies against a man who has prosecuted legal proceedings of a civil or criminal nature against another maliciously and without any reasonable or probable cause,

(*s*) Outlines of Criminal Law, by C. S. Kenny, p. 419.

(*t*) *R.* v. *Gibson* (1887) 18 Q. B. D. 537; *Makin* v. *Att.-Gen. for N. S. Wales* [1894] A. C. 68 *seq.*; and *R.* v. *Saunders* [1899] 1 Q. B. 490. As to the application of this rule in like manner to cases where a new trial can be ordered, see Archbold's Criminal Pleadings, 23rd ed. 1905, p. 291.

whereby such person is injured, as by being arrested and imprisoned or put to expense (*u*). It is not necessary to the maintenance of such an action to show that false evidence has been given by the defendant in the proceedings complained of; but if those proceedings have been supported by false testimony given by the defendant, this form of action is of course none the less an available civil remedy. It is a general principle, however, applicable to actions of this description that the malicious proceedings must be shown to have terminated in favour of the plaintiff who sues in respect of them (*x*). Where the malicious proceedings have been taken in pursuance of a conspiracy between two or more persons, the action is sometimes described as one for conspiracy, and it is a condition of success in such an action that the plaintiff must show that he has suffered damages as the result of the conspiracy (*y*). It would also seem that the general principle above mentioned, that the plaintiff must show that the proceedings have terminated in his favour, must apply no less to such an action than to an ordinary case of malicious prosecution (*z*). It is, however, beyond the scope of this work to discuss further this form of remedy available in the case of false testimony.

(*u*) See Bullen & Leake's Precedents of Pleadings, 6th ed. 1905, p. 424 *seq.*, and other authorities.

(*x*) *Ibid.* Cf. *Bynoe* v. *Bank of England* [1902] 1 K. B. 467.

(*y*) *Cotterell* v. *Jones* (1851) 11 C. B. 713; *Barber* v. *Lissiter* (1860) 29 L. J. C. P. 161.

(*z*) *Castrique* v. *Behrens* (1861) 30 L. J. Q. B. 162; *Bynoe* v. *Bank of England* [1902] 1 K. B. 467.

APPENDIX A.

PUBLIC DOCUMENTS . . . . 422—465

APPENDIX B.

ACTS RELATING TO EVIDENCE . . 466—469

APPENDIX C.

ORDERS 31, 32, 37. . . . . 470—477

APPENDIX D.

FORMS . . . . . 478—483

PUBL

Title, and Source.	Facts to be Proved.
Acknowledgments of Married Women. (i) Made before 1883. 3 & 4 Will. 4, c. 74, ss. 84, 88. Ord. LXI. rr. 1, 1a. 45 & 46 Vict. c. 39, s. 7. (ii) Made since 1882 in respect of deeds executed before 1883. (iii) Deeds made and acknowledged since 1882. Stat. last cited, and Rules made thereunder, rr. 3—6.	(i) Married woman's acknowledgment deed as her deed. (ii) Do. do. (iii) Do. do.
Army and Navy. 44 & 45 Vict. c. 58, s. 163. 58 Vict. c. 7, s. 6. *(See next page.)*	In proceedings under the Army Act, whether before a civil court or a court mar (i) The fact that a soldier has given answers which his attestation pap his declaration on re-engagemen enrolment represents him as ha given. (ii) Enlistment of a person in His Maje service. (iii) Facts respecting service or non-servi or discharge from, His Majesty's f stated in any letter, return, or document. (iv) King's regulations or regulations by Secretary of State or Commissi of His Majesty's Treasury, Royal rants, army circulars or orders, or made by His Majesty or by a Secr of State under the Army Act, 188 (v) Status, rank and appointments of an o in the army; and title or descripti corps, battalion or arm or branc service to which he belongs.

OCUMENTS.

Mode of Proof ; and see pp. 412, 413.	Notes.
) A copy from the Record Office of filed certificate of acknowledgment. (See **Public Records**, p. 462, below.)	
) An office copy from the Central Office of filed certificate of acknowledgment.	
) Married woman's deed with memorandum of acknowledgment thereon signed by a person authorised to take the acknowledgment.	
(i) The attestation paper of the soldier bearing his signature, or the declaration made by him on re-engagement or enrolment, respectively.	
(ii) Copy of the person's attestation paper certified as a true copy by officer having custody of the attestation paper.	
iii) The letter, return, or other document respectively signed by or on behalf of a Secretary of State, or of the Commissioners of the Admiralty, or by the commanding officer of that portion of His Majesty's forces, or of the ship of His Majesty to which the person appears or is alleged to belong or to have belonged.	
v) A copy of such regulations, orders, warrants, circulars, orders or rules respectively printed by any printer to His Majesty, or in India by any Government press.	
v) An army list or gazette published by authority and (a) in the United Kingdom printed by any printer to His Majesty, or issued by His Majesty's Stationery Office (b) in India printed by a Government press or issued by some office under the Governor-General of India or the governor of any presidency in India.	

Title, and Source.	Facts to be Proved.
Army and Navy—*continued.* 44 & 45 Vict. c. 58, s. 163. 58 Vict. c. 7, s. 6.	(vi) Matters and things duly stated in a w rant or order in pursuance of the Ar Act, 1881. (vii) Facts recorded in a regimental book pursuance of any statute, or the Kin regulations, or in pursuance of military duty. (viii) The matters stated in a descriptive ret by a justice of the peace. (ix) The proceedings of a court-martial. (x) Conviction and sentence, or acquittal any civil court of a person subject military law.
Arrangement, Deeds of. 50 & 51 Vict. c. 57, ss. 6—11. Deeds of Arrangement Act Rules, 1888, r. 6. R. S. C., Ord. 61, rr. 1, 7, 25.	Execution, due registration and terms of d of arrangement.
Bankers' Books. 42 Vict. c. 11. 45 & 46 Vict. c. 72, s. 11 (2).	Entries in bankers' books (*i.e.* ledgers, books, cash books, account books, and all ot books used in the ordinary business of bank), and the matters, transactions accounts therein recorded.
Bankruptcy. 46 & 47 Vict. c. 52, s. 132. *Ex parte Learoyd* (1878), 10 Ch. D. 3; *Ex parte French, Re Trim* (1882), 47 L. T. (N. S.) 339; *Re Stanger* (1882), 22 Ch. D. 436. (*See next page.*)	

Mode of Proof; and see pp. 412, 413.	Notes.
vi) The warrant or order respectively made in pursuance of the Army Act, 1881, by any military authority, or a copy thereof certified to be a true copy by the officer therein alleged to be authorised by a secretary of state or commander-in-chief to certify the same. vii) The record in the book itself signed by the commanding officer or other officer whose duty it is to make the record, *or* a copy of the record certified to be a true copy of the officer having custody of the book. iii) The descriptive return itself signed by the justice of the peace. ix) The original proceedings or record in the custody of the Judge Advocate-General or other officer having lawful custody thereof signed by the president of the court; *or* a copy certified to be a true copy thereof by the Judge Advocate-General, or his authorised deputy, or the officer having custody of the proceedings or record. (x) A certificate by the clerk of the civil court, or his deputy or other officer having custody of the records of the court setting forth the offence, and the judgment or acquittal.	As to obtaining copies of the proceedings, see sect. 124.
fice copy from Central Office of the registered copy eed of arrangement; *or* original deed bearing certi-cate under seal of Central Office.	
amined copy of the entries, verified by oral evidence n court or by affidavit, together with proof by a partner r official either oral or by affidavit that the book vas one of the ordinary books of the bank, that the ntries were made in the usual and ordinary course f business, and that the book is in the custody or ontrol of the bank.	See pp. 244—247.

Title, and Source.	Facts to be Proved.
Bankruptcy—*continued.*	
46 & 47 Vict. c. 52, ss. 20 (2), 132 (2), r. 193	(a) Any facts stated in any notice inserted the London Gazette, as *e.g.*— adjudication,
s. 35 (3), r. 194	annulment thereof,
s. 21 (2), r. 298	appointment of trustee,
r. 204 (2)	approval of scheme or composition,
s. 30 (3), r. 242	discharge,
ss. 13, 132 (2)	receiving order,
r. 310	release of trustee,
r. 303	removal of trustee.
ss. 134, 137	(b) Any petition to or order or certificate of bankruptcy court; and any instrume affidavit or document made or used in t course of any proceedings under the Ac
s. 140	(c) Any order or certificate of the Board Trade made under the Act.
s. 133	(d) Proceedings at a meeting of creditors und the Act, and the regularity thereof.
s. 136	(e) Facts deposed to in a proceeding under t Act by a debtor, his wife, or a witne since deceased.
53 & 54 Vict. c. 71, s. 3 (11), (13) ..	(f) The validity of a composition or scheme.
s. 8 (5)	(g) (Upon an application for order of dischar any facts stated in the report of the offic receiver as to conduct and affairs bankrupt.
Baptism in the Church of England.	
70th Canon of 1603.	Baptism, date thereof, christian name of chi and names of parents; and in case of baptis since 1812, also the abode and quality, tra or profession of the parents.
52 Geo. 3, c. 146.	
14 & 15 Vict. c. 99, s. 14.	
Re Hall's Estate (1852), 22 L. J. Ch. 177.	
Re Porter's Trusts (1856), 25 L. J. Ch. 688.	
Doe v. *Fowler* (1850), 14 Q. B. 700.	
For Baptisms not in the Church of England and baptisms in Scotland, Ireland, foreign parts, or on board ship, see pp. 241—244, above.	

Mode of Proof; and see pp. 412, 413.	Notes.
.) Copy of the Gazette containing the notice.	
) The original petition, &c., sealed with the seal of the court, or signed by a judge thereof, or a copy thereof so sealed or signed, or a copy certified as a true copy by any registrar of the court.) The original order or certificate sealed with the seal of the Board or signed by a secretary or assistant secretary of the Board, or by any person authorised in that behalf by the President of the Board. Such a certificate signed by the President himself is conclusive as to the facts certified. l) Minutes of proceedings signed by the chairman of the same or the next meeting.) The deposition or a copy thereof sealed with the seal of the court.	
) Certificate of the official receiver that the composition or scheme has been duly accepted and approved. g) The official receiver's report, produced on the bankrupt's application for his discharge.	It is not clear whether an entry in the register of the date or place of birth or of the fact of illegitimacy is or is not admissible. Against its admissibility are:—*Wihen* v. *Law* (1821) 3 St. 63; *R.* v. *N. Petherton* (1826) 5 B. & C. 508; *R.* v. *Clapham* (1829) 4 C. & P. 29; and *Burghart* v. *Angerstein* (1834), 6 C. & P. 690; for it are—*Cope* v. *Cope* (1833) 1 M. & R. 269; *Morris* v. *Davies* (1827—28) 3 C. & P. 215, 427; (1837) 5 C. & F. 163; and *Re Turner*, *Glenister* v. *Harding* (1885) 29 Ch. D. 985.
n examined or certified copy of the entry of the baptism made by a minister of the parish in the register of baptisms kept in the custody of a minister of the parish, *or* of the entry in the copy register transmitted to and kept in the registry of the diocese.	It is not clear whether the official copy of the parish register (whether of baptisms, marriages or burials) deposited in the registry is to be deemed an original public document so as to render it or copies of it admissible without proof of loss or destruction of the original parish register; *Walker* v. *Beauchamp* (1834) 6 C. & P. 552.

Title, and Source.	Facts to be Proved.
Bills of Sale.	
41 & 42 Vict. c. 31, ss. 10, 16. 45 & 46 Vict. c. 43. *Sharp* v. *McHenry* (1887), 38 Ch. D. 427. *Thomas* v. *Roberts*, [1898] 1 Q. B. 657.	Due execution and attestation of bill of sal terms thereof, and fact and date of registra tion; also fact and date of renewal of registr tion if any.
R. S. C., Ord. 37, r. 4. Ord. 61, r. 7. *Turner* v. *Culpan* (1888), 36 W. R. 278.	
Order 61, r. 28.	
Births in England or Wales after 1st March, 1837.	
6 & 7 Will. 4, c. 86, ss. 35, 38. 37 & 38 Vict. c. 88, ss. 1—8, 32, 38. *R.* v. *Weaver* (1873) L. R. 2 C. C. R. 85. *Re Goodrich*, [1904] P. 138.	Fact and date of birth, christian name and se of person born, names of parents, and rank profession of father.
7 Will. 4 & 1 Vict. c. 22, s. 8.	Also the place of birth if added to the entry i the register by the direction of the Registra General.
Births before 2nd March, 1837, and Births in Scotland, Ireland, Foreign Parts, or on board Ship. (See pp. 241—244, above.)	
Burials.	
(i) Church of England. 70th Canon of 1603. 52 Geo. 3, c. 146. 6 & 7 Will. 4, c. 86, s. 49. *Re Hall's Estate* (1852) 22 L. J. Ch. 177. (*See next page.*)	(i) Fact and date of burial, with name, addre and age of person buried.

Mode of Proof; and see pp. 412, 413.	Notes.
Office copy from Central Office of registered copy bill of sale and of affidavit of execution; also of affidavit of renewal, if any, *or* production of original bill of sale and proof thereof by means of the attesting witness (see pp. 378—381), and proof of due registration of it, *semble*, either by office copy of affidavit *plus* evidence of identity of the bill produced with that filed, *or* by officer attending by request of party to produce the filed documents and prove their registration.	When about twenty years old the registers are transferred to the **Public Records**. (See p. 462, below.)
A certified copy under hand of registrar or registering officer of entry in register-book of births in his custody (*i.e.* book not filled up), *or* copy certified under hand of superintendent registrar of entry in register-book of births in his custody (*i.e.* register-book filled up and transmitted by registrar to superintendent registrar to be kept with records of his office), *or* certified copy sealed or stamped with seal of the general registry office of entry in certified copy register-book kept in that office (*i.e.* those transmitted by superintendent registrars): Provided always that such entry is signed by an informant within the meaning of the said Acts and in the case of births since 1874 is signed by the superintendent registrar if the registration took place more than three but not more than twelve months after the birth, or is made with the authority of the Registrar-General if the registration took place more than twelve months after the birth.	See pp. 241—244.
(i) Examined or certified copy of the entry of the burial made by a minister of the parish in the register of burials kept in the custody of a minister of the parish, *or* of the entry in the copy register transmitted to and kept in the registry of the diocese.	See pp. 241—244. See note under **Baptisms** (p. 427) as to official copy of parish register.

Title, and Source.	Facts to be Proved.
Burials—*continued.*	
Re Porter's Trusts (1856) 25 L. J. Ch. 688. 43 & 44 Vict. c. 41, s. 10.	
(ii) Cemeteries. 10 & 11 Vict. c. 65, ss. 32, 33. 43 & 44 Vict. c. 41, s. 10.	(ii) Fact and date of burial, with name, addres and age of person buried.
(iii) Burial Boards. 16 & 17 Vict. c. 134. 17 & 18 Vict. c. 87. 20 & 21 Vict. c. 81. 43 & 44 Vict. c. 41, s. 10.	(iii) Do. do.
(iv) Other Burial Grounds. 27 & 28 Vict. c. 97. 43 & 44 Vict. c. 41, s. 10.	(iv) Do. do.
Burials not within any of the above heads, including burials in Scotland, Ireland, Foreign Parts, or at Sea. (See pp. 241—244, above.)	
Charitable Trusts.	
16 & 17 Vict. c. 137, s. 8. 18 & 19 Vict. c. 124, s. 5. 50 & 51 Vict. c. 49, s. 3.	(a) Proceedings of the Board of Charity Com missioners for England and Wales.
	(b) Order, certificate, scheme or document o the Board.
18 & 19 Vict. c. 124, s. 42.	(c) Deed, will or document relating to an charity and enrolled in the books of th Board.
35 & 36 Vict. c. 24, s. 6.	(d) Fact and date of valid incorporation of th trustees of any charity for religiou educational, literary, scientific or publ charitable purposes.
54 Vict. c. 7, s. 5.	(In proceedings by the Board under this Ac any documents and facts stated in the printe reports of the Charity Commissioners appointe under 58 Geo. 3, c. 91, and other Acts fo inquiring into charities.

Mode of Proof; and see pp. 412, 413.	Notes.
ii) (iii) (iv) Examined or certified copy of the entry of the burial in the register-book belonging to the persons, board, or public body owning the cemetery or burial ground respectively, *or* of the entry in the official copy registers transmitted by those persons or bodies respectively to the registry of the diocese.	See note under **Baptisms** (p. 427) as to official copies deposited in the registry.
a) Copy, certified by the signature of the secretary or of any officer of the Board (whether assistant secretary or other) authorised by an order of the Board signed by two Commissioners to act on behalf of the secretary of the Board, of entries similarly certified in the minute-books of the Board. b) The original order, certificate, scheme or document under the seal of the Board, *or* a copy, certified as aforesaid, of the entry thereof similarly certified in the minute-books of the Board. c) Copy of the deed, will or document made from such books of enrolment and certified under the hand of the secretary or of one of the Commissioners. d) The certificate of incorporation under the seal of the Board, *or* such verified copy of the entry thereof as mentioned above (b).	
The printed reports themselves.	62 & 63 Vict. c. 33, authorises the transfer of charities relating to education to the Board of Education.

Title, and Source.	Facts to be Proved.
Companies Acts.	
25 & 26 Vict. c. 89, s. 31.	(a) That a person is a member of the compa entitled to a particular share or shares stock in the company.
s. 37.	(b) Any matters directed or authorised to inserted in the register of members, as-
s. 25.	1. Names, addresses and occupations members, with dates of membersh shares held and amounts paid on sam
s. 26.	2. Annual list of members and particul of company's capital, &c.; and
43 Vict. c. 19, s. 6.	3. Particulars as to share warrants issued
30 & 31 Vict. c. 131, s. 31.	
25 & 26 Vict. c. 89, s. 67.	(c) Resolutions and proceedings of gene meetings of a company, or of meetings its directors or managers, and the reg larity thereof respectively.
25 & 26 Vict. c. 89, ss. 18, 174 (5), 192.	(d) The fact and date of the incorporation of company and the fact of its registrati and that all the requisitions of the Co panies Acts in respect of registration a of matters precedent and incidental there have been complied with, and that it i company authorised to be registered, a duly registered under the Compan Acts.
40 & 41 Vict. c. 26, s. 6.	
42 & 43 Vict. c. 76, s. 9.	
63 & 64 Vict. c. 48, s. 1.	
Re Barned's Banking Co., Peel's case (1867) 2 Ch. 674.	
Oakes v. *Turquand* (1867) L. R. 2 H. L. 325, 354.	
25 & 26 Vict. s. 174 (5).	(e) The terms of any document filed and reg tered at the office for the registration joint stock companies, as
40 & 41 Vict. c. 26, s. 6.	
25 & 26 Vict. c. 89, s. 17	memorandum and articles of association,
s. 34	notice of increase of capital or members,
s. 40	notice of situation of registered office company, and of any change therein,
s. 45	copy of company's register of directors,
s. 53	copy of every special resolution,
s. 112	report of order of dissolution,
s. 143	return of general meeting for reception full account of voluntary winding-up,
30 & 31 Vict. c. 131, s. 15, and 40 & 41 Vict. c. 26, s. 4.	copy of order of court and minute as reduction of capital,
53 & 54 Vict. c. 62, s. 2.	order confirming alteration of memorandu deed of settlement or constitution, a terms of altered memorandum or deed, substituted memorandum and articles.
Companies Clauses Acts.	
8 & 9 Vict. c. 16, ss. 11, 12.	(a) That a person is a member of the compa entitled to a particular share or shares the undertaking of the company.
s. 98	(b) Appointments and contracts made by t directors, and orders and proceedings meetings of the company, and of meetin

(*See next page.*)

Mode of Proof; and see pp. 412, 413.	Notes.
a) Certificate under the common seal of the company specifying the share or shares or stock held by such person. b) The company's register of members kept at its registered office, *or* an examined or certified copy thereof.	
c) The company's minute-books, containing minutes of such resolutions and proceedings signed by the chairman of the same or of the next meeting, *or* an examined or certified copy thereof.	
d) A certificate of incorporation, whether the original certificate or not, under the hand of the Registrar of Joint Stock Companies or of an assistant registrar.	
) Copy of the document, certified to be a true copy thereof under the hand of the Registrar of Joint Stock Companies or of an assistant registrar.	
) Certificate under the common seal of the company specifying the share or shares held by such person.) The company's minute-books, containing minutes of such appointments, &c. respectively signed by the chairman of the meeting at which they	

Title, and Source.	Facts to be Proved.
Companies Clauses Acts— *continued.*	
s. 127	of the directors and of committees directors, and the regularity thereof. (c) The bye-laws of a company.
Companies' Mortgage Debentures. 28 & 29 Vict. c. 78, ss. 9, 20, 27, 31, 32. 33 & 34 Vict. c. 20, s. 11.	Particulars of mortgage debentures of any co pany incorporated under the Companies A or any statute, and particulars of securit of the company upon which the issue of su mortgage debentures is issued.
Copyholds. (See "**Manorial Rights,**" p. 454.)	
Copyright.	
(i) Copyright in the United Kingdom, of works first produced in the United Kingdom, and also of works first produced in a British possession wherein no provision for registration of copyright exists.	(i)
(a) Book or dramatic or musical piece. 5 & 6 Vict. c. 45, s. 11. 49 & 50 Vict. c. 33, s. 8.	(a) Proprietorship of the copyright of a book of a dramatic or musical piece (as defi by sect. 2) and assignments of or licen affecting the same. And, in the case of dramatic musical pieces, the right of represen tion or performance.
(b) Painting, drawing, or photograph. 25 & 26 Vict. c. 68, ss. 4, 5.	(b) Same facts as mentioned in the first pa graph of (a) relating to a painti drawing or photograph, together w
(ii) Copyright in the United Kingdom, of works first produced in a foreign country, or in a British possession in which provision is made for registration of copyright. 7 & 8 Vict. c. 12, ss. 6, 8. 49 & 50 Vict. c. 33, ss. 4, 9.	such particulars as are mentioned in sect (ii)
(a) Book or dramatic or musical piece.	(a) Title to the copy thereof, name and place abode of author or composer, name place of abode of proprietor of copyrig time and place of first publication

(*See next page.*)

Mode of Proof ; and see pp. 412, 413.	Notes.
took place, *or* an examined or certified copy thereof.) A written or printed copy under the common seal of the company of such bye-laws.	
n examined or certified copy or extract of or from the register of mortgage debentures or the register of securities, as the case may be, kept in the office of the land registry, *or* of or from the like registers kept in the registered office of the company.	
) A copy, certified under the hand of the officer in charge of the book of registry kept at Stationers' Hall and impressed with the stamp of the Stationers' Company, of entries in the said book of registry relating to such book or piece.) A copy, authenticated as aforesaid, of entries relating to such painting, &c. in the register of Proprietors of copyright in paintings, drawings and photographs, at the same place.	
) A copy, authenticated as aforesaid, of entries relating to such book, &c. in the register of books, &c. kept at Stationers' Hall, so far as the order in council applying the statutes applies the registration provisions thereof.	

Title, and Source.	Facts to be Proved.
Copyright—*continued.*	
	printed, and of first representation or p formance in the foreign country, or na and place of abode of person entitled that right.
(b) Prints.	(b) Title of the print, name and place of abo of inventor, designer or engraver, na of proprietor of copyright, and time a place of first publication thereof.
(c) Article of sculpture.	(c) Descriptive title thereof, name and place abode of maker, name of proprietor copyright, and time and place of fi publication in the foreign country.
(iii) Copyright in a foreign country as to which an order in council has been made, of works first produced there. 49 & 50 Vict. c. 33, s. 7.	(iii) Proprietorship of the copyright.
(iv) Copyright in a British possession wherein provision is made for registration of copyright, and as to which an order in council has been made, of works first produced there. 49 & 50 Vict. c. 33, s. 8.	(iv) Proprietorship of the copyright.
Corporations and other Public Bodies.	
(i) Corporations Generally. *R.* v. *Mothersell* (1718) 1 Str. 93. *R.* v. *Fraternity of Hostmen of N.* (1745) 2 Str. 1223, and cases there cited. *Fox* v. *Bearlock* (1881) 17 Ch. D. 429.	(i) Bye-laws and minute-books of corporati and any facts duly entered in such boo
(ii) Borough and County Councils. 45 & 46 Vict. c. 50, ss. 22, 24. 51 & 52 Vict. c. 41, s. 75. *Robinson* v. *Gregory* [1905] 1 K. B. 534.	(ii) (a) Proceedings at any meeting of council or of any committee thereof.
	(b) Existence and due making of a bye-l of any such council.
(iii) Urban District Councils (not being Borough Councils) and Rural District Councils. (*See next page.*)	(iii) (a) Existence and due making and c firmation of a bye-law of the council

Mode of Proof ; and see pp. 412, 413.	Notes.
b) A copy, authenticated as aforesaid, of entries relating to such book, &c. in the register of books, &c. kept at Stationers' Hall, so far as the order in council applies to the register of prints. c) Do. do. as to the register of articles of sculpture.	
iii) An extract from a register or a certificate or other document stating the existence of the copyright, or the person who is the proprietor of such copyright authenticated by the official seal of a minister of state of the foreign country, or by the official seal or the signature of a British diplomatic or consular officer acting in that country. iv) An extract from the official register kept in the British possession purporting to be certified as a true copy by the officer keeping it, and authenticated by the public seal of the possession, or by the official seal or the signature of a governor of a British possession, or of a colonial secretary, or of some secretary or minister administering a department of the government of a British possession.	
) *Semble*, in the absence of express statutory provision, verified original, *or* examined copy of or extract from, bye-laws or minute-books respectively, duly entered and authenticated.	
i) (a) Minute of such proceedings signed at the same or the next ensuing meeting by the mayor or chairman, as the case may be, of such council or by a member of the council or of the committee, as the case may be, describing himself as or appearing to be chairman of the meeting at which the minute is signed. (b) A written copy of the bye-law authenticated by the corporate seal of the council. ii) (a) A copy of the bye-law signed and certified by the clerk of the council to be a true copy and to have been duly confirmed.	

Title, and Source.	Facts to be Proved.
Corporations and other Public Bodies—*continued.*	
38 & 39 Vict. c. 55, ss. 4, 186, 199, and Sched. I., r. 10. 56 & 57 Vict. c. 73, ss. 21, 59.	(b) The fact of the holding of a meeti of the council or of a committee there and of the proceedings thereat, and th such meeting and proceedings we regular.
(iv) Boards of Guardians and District Boards for Schools. 5 & 6 Vict. c. 57, s. 17. 7 & 8 Vict. c. 101, s. 69. 11 & 12 Vict. c. 110, s. 11.	(iv) (a) The making of an order or the preferri of a complaint, claim or application, the giving of any authority by a such board.
	(b) The fact and date of the chargeabili of a particular pauper to a particul parish.
56 & 57 Vict. c. 73, s. 59.	(c) In the case of a board of guardians: t fact of the holding of a meeting of t board, and the proceedings thereat, a that such meeting and proceedings we regular.
(v) Parish Councils and Meetings. 56 & 57 Vict. c. 73, ss. 2, 3, Sched. I., pt. 3 (1) (2).	(v) The proceedings of a parish council or o committee thereof, or of a parish meetin
(vi) Vestries. *R.* v. *Martin* (1809) 2 Camp. 100. *Hartley* v. *Cook* (1832) 5 C. & P. 441.	(vi) The proceedings of the vestry.
Crown and Crown Departments.	
8 & 9 Vict. c. 113, s. 3. 31 & 32 Vict. c. 37. 45 Vict. c. 9.	Any proclamation, order or regulation, issu before or after the first-mentioned Act, by a of the undermentioned authorities, namely:
	(a) The King or the Privy Council;
	(b) The Treasury;
	(c) The Commissioners for executing t office of Lord High Admiral;
	(d) Secretaries of state; (e) Committee of Privy Council for Trad
(*See next page.*)	

Mode of Proof; and see pp. 412, 413.	Notes.
(b) A minute of such meeting and proceedings or a copy of any order or resolution made or passed thereat, signed by the chairman of the meeting at which the proceedings took place or of the next ensuing meeting.	
(iv) (a) Copy of the minute of any such order, complaint, &c., or of the resolution to make the same, signed by the presiding chairman of the board, and sealed with their seal and countersigned by their clerk or person acting as their clerk.	
(b) Certificate signed, sealed and countersigned as aforesaid that the pauper has so become chargeable.	
(c) A minute of such meeting and proceedings or a copy of any order or resolution made or passed thereat, signed by the chairman of the meeting at which the proceedings took place or of the next ensuing meeting.	
v) A minute of the proceedings of such council committee or meeting signed at the same or the next ensuing meeting by a person describing himself as or appearing to be chairman of the meeting at which the minute is signed.	
vi) Verified original *or* examined copies of or extracts from the minute-books of the vestry, duly entered by the proper officer.	As to custody, see now 56 & 57 Vict. c. 73, s. 17.
A copy of such proclamation, order or regulation contained in the Gazette, *or* printed by the Government printer or under the superintendence or authority of His Majesty's Stationery Office (or in the case of a royal proclamation the printers to the Crown or to either House of Parliament), *or* a copy certified to be true by the following authorities respectively:—	
(a) The clerk or one of the lords or others of the Privy Council;	
(b) Any commissioner, secretary or assistant secretary of the Treasury;	
(c) One of the Commissioners for executing the office of Lord High Admiral or either of the secretaries to them;	
(d) Any secretary or under-secretary of state;	
(e) Any member of the Committee of the Privy Council for Trade or any secretary or assistant secretary of the Committee;	

Title, and Source.	Facts to be Proved.
Crown and Crown Departments—*contd.*	
34 & 35 Vict. c. 70, s. 7. 38 & 39 Vict. c. 55, s. 135.	(f) Poor Law Board and their successo the Local Government Board ;
33 & 34 Vict. c. 75, s. 83.	(g) Education Department ;
33 & 34 Vict. c. 79, s. 21. 44 & 45 Vict. c. 20, s. 7. 47 & 48 Vict. c. 76, s. 15.	(h) Postmaster-General ;
48 & 49 Vict. c. 36, s. 6. 55 & 56 Vict. c. 43, s. 17 (3).	(i) Secretary of state acting in purs-an of the Artillery and Rifle Ranges Ac 1885, or the Military Lands Ac 1892 ;
58 Vict. c. 9. 3 Edw. 7, c. 31.	(j) Board of Agriculture and Fisheries.
Death within England or Wales After 28th Feb., 1837.	
6 & 7 Will. 4, c. 86, ss. 32, 34, 37, 38. 37 & 38 Vict. c. 88, ss. 32, 37, 38.	Fact and date of death of person named in t register-book, with sex, age, rank or pr fession, and cause of death.
7 Will. 4 & 1 Vict. c. 22, s. 8.	Also the place of death when added to t entry in the register by direction of registra general.
For deaths in England and Wales before 2nd March, 1837, and deaths in Scotland, Ireland, foreign parts or on board ship, see pp. 241—244, above.	

Mode of Proof; and see pp. 412, 413.	Notes.
(f) Any Commissioner of the Poor Law Board or their successors the Local Government Board or any secretary or assistant secretary of the same;	
(g) Any member, secretary or assistant secretary of the Education Department;	(g) This statute, while applying the Documentary Evidence Act, 1868, provides a like mode of proof for other descriptions of documents than those mentioned in it.
(h) Any secretary or assistant secretary of the Post Office;	
(i) Any secretary or under-secretary of state;	(i) These statutes apply the Documentary Evidence Act, 1868, to bye-laws made under them.
(j) The president, or any member, or the secretary, of the Board, or any person authorised by the president to act for the secretary.	(j) By the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 7, similar provisions are made with regard to the proof of documents issued by the Board other than those mentioned in the Documentary Evidence Act, 1868.
copy certified under hand of registrar or registering officer of entry in register-book of deaths in his keeping (*i.e.* book not filled up), *or* copy certified under hand of superintendent registrar of entry in register-book of deaths in his custody (*i.e.* register-book filled up and transmitted by registrar to superintendent registrar to be kept with records of his office), *or* certified copy sealed or stamped with seal of the general registry office of entry in the certified copy register-book kept in that office (*i.e.* those transmitted by the superintendent registrars): Provided always that such entry is signed by an informant within the meaning of the said Acts, *or* made upon a certificate from a coroner, *and*, if made more than twelve months after the death or finding of the body, made with the authority of the registrar-general and in accordance with the prescribed rules.	See pp. 241—244.

Title, and Source.	Facts to be Proved.
Diseases of Animals.	
57 & 58 Vict. c. 57, ss. 37, 48 (1).	An order or regulation of a local authority m under the Act.
Ecclesiastical Matters.	
(i) Dilapidations. 34 & 35 Vict. c. 43, ss. 34, 35.	(i) (a) Bishop's order stating the repairs to buildings of the benefice and their for which the late incumbent his exe tors and administrators is or are liab
s. 46.	(b) Surveyor's certificate of completion repairs.
s. 50.	(c) Surveyor's special certificate of com tion by incumbent of substituted wo
(ii) Farming Leases by Incumbents. 5 & 6 Vict. c. 27, s. 14.	(ii) Contents and due execution of lease incumbent of lands belonging to benefice, surrender, surveyor's appoi ment, map or plan, or copy or extract f same, certificate, valuation, or rep made in pursuance of the Act.
(iii) Long Leases by Ecclesiastical Corporations. 21 & 22 Vict. c. 57, s. 12 (and see sect. 29 of the incorporated Act).	(iii) Contents and due execution of any le grant or confirmation executed by ecclesiastical corporation under the A and of any map, plan, statement, cer cate, valuation or report relating there
(iv) Register of Bishop. *Humble* v. *Hunt* (1817) Holt N. P. 601. *Arnold* v. *Bishop of Bath* (1829) 5 Bing. 316. *Hartley* v. *Cook* (1832) 5 C. & P. 441.	(iv) Contents of any document or entry prop entered in the register.
(v) Relinquishment of Preferment. 33 & 34 Vict. c. 91, s. 7.	(v) Contents of deed of relinquishment and due execution, enrolment, and record in the registry, and the fulfilment of other requirements of the Act.
(vi) Tithe Apportionment. 6 & 7 Will. 4, c. 71, ss. 2, 64. *Giffard* v. *Williams* (1869) 38 L. J. Ch. 597. *Wilberforce* v. *Hearfield* (1877) 5 Ch. D. 709. *Smith* v. *Lister* (1895) 64 L. J. Q. B. 154. *Palmer* v. *Andrews* (1902), cited in Moore & Moore on Fisheries, p. 147.	(vi) Contents of and facts recited in any firmed instrument of apportionment confirmed agreement to give land ins of tithes or rent-charge, and of any or plan annexed to such instrumen agreement.

Mode of Proof; and see pp. 412, 413.	Notes.
The production of a newspaper containing the order or regulation as an advertisement, *or* a copy of the order or regulation certified by the clerk of the local authority to be a true copy.	
i) (a) Examined or certified copy of the order or certificate filed in the bishop's registry. (b) Do. do. (c) Do. do.	
ii) Office copy certified under the hand of the registrar of diocese or peculiar jurisdiction, or his deputy, of the counterpart or attested copy lease, or of other documents respectively deposited in his office.	
ii) Office copy certified under the seal of the Ecclesiastical Commissioners of the counterpart lease, grant or confirmation or any other document respectively.	
v) Examined or certified copy of any such document or entry respectively.	
v) Copy of the record of the deed in the registry of the diocese, duly extracted and certified by the registrar of the bishop.	
i) Copy or extract sealed or stamped with the seal of the Tithe Commissioners or their successors the Land Commissioners, or their successors the Board of Agriculture and Fisheries, of or from the copy of such confirmed instrument or agreement respectively, deposited in the registry of the diocese, *or* of or from that deposited and kept with the public books, writings and papers of the parish, and of or from any map or plan annexed thereto respectively, *or* the original produced by an officer of the Board of Agriculture and Fisheries.	For Land Commissioners, see 45 & 46 Vict. c. 38, s. 48. For Board of Agriculture and Fisheries, see 52 & 53 Vict. c. 30, s. 2; 3 Edw. 7, c. 31. As to custody of copy deposited with books of parish, see 56 & 57 Vict. c. 73, s. 17; and *Lewis* v. *Poole* [1898] 1 Q. B. 164.

Title, and Source.	Facts to be Proved.
Employment of Children. 3 Edw. 7, c. 45, s. 3 (6).	The fact that the lifting, carrying or moving any specified weight is likely to cause inju to a child in any employment (when soug to be proved against the employer in resp of the employment of the child).
Enrolled Deeds. 12 & 13 Vict. c. 109, ss. 17—19. Jud. Act (Officers) 1879, ss. 5, 12. 54 & 55 Vict. c. 67, s. 1, paragraph 7. Ord. LXI. rr. 1, 6—14; Ord. XXXVII. r. 4. *Smartle* v. *Williams* (1694) 1 Salk. 280. *Giles* v. *Smith* (1834) 1 C. M. & R. 462. *Doe* v. *Lloyd* (1840) 1 M. & G. 671. *Haigh* v. *West* [1893] 2 Q. B. 19.	Due execution, contents, and enrolment of t deed, and any plan thereto annexed.
Factories and Workshops. 54 & 55 Vict. c. 75, s. 12 (see 1 Edw. 7, s. 161, 7th sched. Pt. 2). 1 Edw. 7, c. 22, s. 15. s. 129. s. 147.	(i) The terms of special rules established und the Factory and Workshop Act, 1891, f any factory or workshop, and the fa that they have been duly established und the Act. (ii) Bye-laws of district council providing f means of escape from fire in the case any factory or workshop. (iii) Any facts required by the Act of 1901 be entered in the general register to kept in a factory or workshop (wh sought to be proved as against the occ pier thereof). (iv) Age of a person employed in a factory workshop.
Fisheries (Salmon and Fresh Water). 28 & 29 Vict. c. 121, ss. 4 and 5. 36 & 37 Vict. c. 71, ss. 5 and 8. (*See next page.*)	(i) Constitution of fishery district.

Mode of Proof; and see pp. 412, 413.	Notes.
. certificate signed by a registered medical practitioner stating that fact, and proved to have been sent to the employer.	
he original deed with a certificate, sealed or stamped with the proper seal of the Central Office, *or* a copy of the enrolment sealed or stamped with such seal, with plan or copy plan annexed thereto respectively.	When about two years old enrolments are transferred to the **Public Records**. (See p. 462, below.)
(i) A copy, certified by an inspector under the Act, of such special rules.	
ii) (See **Corporations and other Public Bodies** (iv), above, p. 438.)	
ii) Production of the general register containing the entries made by the occupier or on his behalf.	
v) A declaration in writing by a certifying surgeon for the district in which the factory or workshop is situate that he has personally examined the person and believes him or her to be under the age set forth in the declaration.	
(i) Copy of the certificate of constitution granted by the Secretary of State or his successors the Board of Trade or their successors the Board of Agriculture and Fisheries, and deposited with the	See also sect. 53 of the first mentioned Act. For transfer to Board of Trade, see 49 & 50 Vict. c. 39, s. 3.

Title, and Source.	Facts to be Proved.
Fisheries (Salmon and Fresh Water)—*continued.*	
28 & 29 Vict. c. 121, ss. 47, 53.	(ii) Any order, plan or map of the Comm sioners.
36 & 37 Vict. c. 71, s. 35.	(iii) The proceedings at any meeting of a Bo of conservators, and the regularity such meeting.
36 & 37 Vict. c. 71, ss. 39, 45.	(iv) Terms of bye-laws and the fact that same were duly made.
36 & 37 Vict. c. 71, s. 64.	(v) Any scale of licences approved by the sec tary of state in pursuance of the Act 1865.
For **Sea Fisheries**, see p. 464, below.	
Foreign and Colonial Acts of State and Judicial Proceedings.	
14 & 15 Vict. c. 99, s. 7.	(i) Proclamation, treaty, or other act of st of a foreign state or a British colony.
	(ii) Judgment, decree, order or other judi proceeding of a foreign or colonial co or an affidavit, pleading or other le document filed or deposited therein.
Inclosure Awards.	
(i) Under Special Acts. 41 Geo. 3, c. 109, s. 35. 3 & 4 Will. 4, c. 87, s. 2. Cf. Jud. Act (Officers) 1879.	(i) Fact of award and all matters and fa enacted by or recited in it, and any m annexed to and enrolled with it.
(ii) By consent under Act of 1836. 6 & 7 Will. 4, c. 115, s. 51. 3 & 4 Vict. c. 31, s. 1. (*See next page.*)	(ii) The same.

Mode of Proof; and see pp. 412, 413.	Notes.
clerk of the peace of the county, such copy being certified by him to be a true copy, *or* a certified copy of the duplicate certificate in the custody of the last mentioned Board, *or* such duplicate itself produced by an officer of the Board.	For transfer to Board of Agriculture and Fisheries, see 52 & 53 Vict. c. 30, ss. 6, 7; 3 Edw. 7, c. 31. See also as to copies issued of the Board of Agriculture and Fisheries, p. 440, above. And see generally for documentary evidence connected with Salmon and Fresh Water Fisheries, 49 & 50 Vict. c. 39, s. 4.
i) Certified copy of same, issued by the Board of Agriculture and Fisheries.	
i) Production of the minutes of the proceedings signed by the chairman of the meeting or by the chairman of the next meeting.	
v) Written or printed copy of confirmed bye-laws authenticated by the common seal of the conservators, *or* (as to the due making of the bye-laws) a copy of newspaper containing notice of the making of the bye-laws.	
r) A copy of the scale certified by the secretary or under-secretary of state.	For the Documentary Evidence Act, 1865, here applied, see **Crown**, &c., p. 438, above.
) Copy of the document sealed with the seal of the foreign state or the British colony *or* an examined copy.	
) Copy of the document sealed with the seal of the foreign or colonial court, or (if the court have no seal) signed by a judge of the court, who shall annex to his signature a statement that the court has no seal *or* an examined copy.	
) A copy or extract of or from the award enrolled, signed by the proper officer, namely, either by the clerk of the peace of the county wherein the lands are situate or his deputy, *or* (if the award was enrolled in one of the courts) a copy from the **Public Records** (see p. 462 below), *or* the original award produced by the officer having custody thereof.	As to (i) and (ii) see Printed Returns (Common Lands) 4th Dec. 1893, and Printed Returns (Inclosure Awards) 15th Feb. 1904.
Semble, the same.	

Title, and Source.	Facts to be Proved.
Inclosure Awards—*continued.*	
(iii) By the Inclosure Commissioners, or their successors the Land Commissioners, or their successors the Board of Agriculture and Fisheries. 8 & 9 Vict. c. 118, ss. 2, 105, 146. 39 & 40 Vict. c. 56, s. 33. 45 & 46 Vict. c. 38, s. 48. 52 & 53 Vict. c. 30, s. 2. 3 Edw. 7, c. 31.	(iii) Fact of award and all matters and fa enacted by or recited in it, and any m annexed to and enrolled with it.
Irish Public Documents.	
14 & 15 Vict. c. 99, s. 10.	Any public document admissible in evidence Ireland and the contents thereof.
Judicial Proceedings.	
(i) Of High Court of Justice. R. S. C. Ord. XXXVII. r. 4. Ord. LXI. rr. 7, 28, 29. *R.* v. *Scott* (1877) 2 Q. B. D. 415.	(i) (a) Writs, records, pleadings and docume filed in the Central Office or the Cro Office Department or in the Prob or Admiralty Registry of the Hi Court of Justice (as to the docume so filed, see R. S. C.).
8 & 9 Vict. c. 113, s. 2.	(b) Decrees, orders, certificates and ot judicial and official documents sig by any judge of the Supreme Court
Jud. Act, 1873, s. 61.	(c) Writs and other documents issued out or filed in any district registry.
(ii) Of County Courts. 51 & 52 Vict. c. 43, ss. 28, 180.	(ii) Plaints, summonses, orders, judgmen executions and returns thereto, fines, a all other proceedings in or process issu out of the court.
(iii) Upon Indictments. 14 & 15 Vict. c. 99, s. 13. *Richardson* v. *Willis* (1872) L. R. 8 Ex. 69. Cf. 14 & 15 Vict. c. 100, s. 22; and 28 Vict. c. 18, s. 6.	(iii) (a) Trial and conviction or acquittal any person charged with any indi able offence.

(*See next page.*)

Mode of Proof; and see pp. 412, 413.	Notes.
(iii) A copy or extract certified as a true copy or extract by the clerk of the peace of the county where the lands are situate, of or from the copy confirmed award deposited with him, *or* a copy or extract of or from the copy award deposited with the public books writings and papers of the parish wherein the lands are situate, signed and certified by the incumbent or other officer or person having the custody of them, *or* the original of either of the said deposited copies produced by an officer of the Board of Agriculture and Fisheries.	As to the custody of the copy deposited with the books of the parish see 56 & 57 Vict. c. 73, s. 17.
The same mode of proof as would be admissible in Ireland.	
(i) (a) An office copy, duly sealed from the Central Office or the Crown Office Department or the Probate or Admiralty Registry respectively, of such writ or other document respectively, *or* the original writ or document produced by an officer of the court in pursuance of an order of a judge or master or on request. (b) *Semble*, the original decree or other document so signed, if still existing, from the **Public Records.** (See p. 462, below.) (c) The original writ or other document, or an exemplification or copy thereof, sealed with the seal of such district registry. (ii) The original summons or other process issued out of the court, sealed or stamped with the seal of the court, *or* the registrar's minute-book from the office of the court containing the entry of the plaint or other proceeding, *or* a copy of such entry bearing the seal of the court and signed and certified by the registrar as a true copy thereof. (ii) (a) Document certified under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, to be a copy of the record of the indictment, trial, conviction and judgment, or acquittal, as the case may be, omitting the formal parts thereof.	When about 20 years old these judicial records (except Chancery cause books) are sent, if not previously destroyed, to the **Public Records.** (See p. 462, below.)

Title, and Source.	Facts to be Proved.
Judicial Proceedings—*contd.*	
34 & 35 Vict. c. 112, s. 18. Cf. 28 Vict. c. 18, s. 6.	(b) Conviction of any person charged w an indictable offence.
(iv) Before Justices and on appeal from them. 11 & 12 Vict. c. 43, s. 14. *Hartley* v. *Hindmarsh* (1866) L. R. 1 C. P. 553, 556. *Watson* v. *Little* (1860) 29 L. J. Ex. 267. 34 & 35 Vict. c. 112, s. 18. 42 & 43 Vict. c. 49, s. 22. *Commr. of Police* v. *Donovan* [1903] 1 K. B. 895.	(iv) (a) Conviction or order.
11 & 12 Vict. c. 43, s. 43. 42 & 43 Vict. c. 49, s. 27. *R.* v. *Hutchins* (1880) 5 Q. B. D. 353. Cf. 24 & 25 Vict. c. 100, s. 43.	(b) Dismissal.
42 & 43 Vict. c. 49, s. 31 (6).	(c) Order on appeal from justices not c firming their decision.
(v) Other cases, where no statutory provision.	(v) (a) Any judicial proceedings therein.
(a) *Courts of Record :* *R.* v. *Smith* (1828) 8 B. & C. 341. *R.* v. *Ward* (1834) 6 C. & P. 366. *R.* v. *Yeoveley* (1838) 8 A. & E. 806. *Hartley* v. *Hindmarsh* (1866) L. R. 1 C. P. 553.	
(b) *Courts not of Record :* *Dyson* v. *Wood* (1824) 3 B. & C. 449. *Dawson* v. *Gregory* (1845) 7 Q. B. 756.	(b) Do. do.

(*See next page.*)

Mode of Proof; and see pp. 412, 413.	Notes.
(b) Certificate of substance and effect of indictment and conviction signed by the clerk of the court or other officer having custody of the records, or by the deputy of such clerk or officer.	
) (a) Original (*or*, perhaps, examined copy of) conviction or order duly drawn up under hand and seal of justice or justices making the same and filed with records of quarter sessions of the peace, *plus* evidence *aliunde* to verify the signature and seal, *or* (in case of conviction) copy thereof signed by any justice having jurisdiction over the offence in respect of which the conviction was made or by the proper officer of the court by which the conviction was made, or by a clerk or other officer of any court to which conviction has been returned.	
(b) Certificate of the order of dismissal under hand and seal of justice or justices making the order.	
(c) Memorandum of the decision on appeal endorsed on the conviction or order appealed against and included in any such copy or certificate as aforesaid of the conviction or order of justices, *plus* evidence *aliunde* as in first part of (a) above.	
) (a) *Semble*, the record duly drawn up or an examined or certified copy of it.	
(b) Such minute, if any, as is regularly kept in the court, verified by the proper officer of the court, *or* where no such minutes are kept, oral evidence of the proceedings.	

Title, and Source.	Facts to be Proved.
Judicial Proceedings—*contd.* (vi) Of same Court whether of Record or not of Record: *R.* v. *Tooke* (1794) 25 St. Tr. 447. *R.* v. *Newman* (1851) 2 Den. C. C. 390. *London School Board* v. *Harvey* (1879) 4 Q. B. D. 451. *R.* v. *Hutchins* (1880) 5 Q. B. D. 353. *Commissioner of Police* v. *Donovan* [1903] 1 K. B. 895.	(c) Any judicial proceedings when requ to be proved in subsequent proc ings in the same court.
Land Tax Assessments. 38 Geo. 3, c. 5, ss. 4, 8, 15, 16. *R.* v. *King* (1788) 2 T. R. 234. *Doe* v. *Seaton* (1834) 2 A. & E. 171.	The assessment of any particular lands, and facts duly entered therein, as *e.g.* the fact the lands were occupied by the persons an the times therein mentioned.
Land Titles and Transfer. 60 & 61 Vict. c. 65, s. 8. 38 & 39 Vict. c. 87, ss. 78—81, 104, 107, 120. ss. 10, 29.	(i) Land certificate as to freehold land, the several matters contained therein.
ss. 16, 34.	(ii) Registered lease and its contents.
ss. 22, 40.	(iii) Certificate of charge and the several ma contained therein.
Licensed Premises. 35 & 36 Vict. c. 94, ss. 36, 48, 58. 2 Edw. 7, c. 28, s. 9.	Terms of the licence and all matters relatin it, as *e.g.* particulars of the licensed prem name of owner, name of holder of licence, any forfeiture of licence, disqualificatio premises or conviction of holder of licenc
Life Insurance Companies. 33 & 34 Vict. c. 61, s. 17.	Any statement, abstract, or other docu deposited with the Board of Trade or Registrar of Joint Stock Companies.

Mode of Proof; and see pp. 412, 413.	Notes.
(c) *Semble*, the court books containing the minutes of the proceedings of the court.	
Examined or certified copy of entry in the duplicate assessments in the custody of the collectors of land tax, *or* in those in the custody of the Commissioners of Land Tax, within whose district or division the lands are situate.	
(i) *Semble*, the registered proprietor's land certificate, duly authenticated by the seal of the land registry or district land registry, *or* an examined copy of the register made and proved by the registered proprietor or other person authorised under sect. 104. ii) *Semble*, the registered proprietor's office copy of the registered lease, *or* an examined copy as above. ii) *Semble*, the registered proprietor's certificate of charge, *or* an examined copy as above.	
he register of licences kept by the clerk of the licensing justices of the district in which the licensed premises are situate containing entries relating thereto signed by the said clerk *or* copy of such entries signed by the said clerk and certified by him to be a true copy.	
he original statement, abstract or document certified by a secretary or assistant secretary of the Board of Trade or by the registrar to be the deposited document *or* a copy similarly certified to be a copy of the deposited document.	

Title, and Source.	Facts to be Proved.
Manorial Rights.	
(i) Manor Courts. *Doe* v. *Hall* (1812) 16 East, 208. *Doe* v. *Mee* (1853) 4 B. & Ad. 617. 15 & 16 Vict. c. 51, ss. 9, 20. 50 & 51 Vict. c. 73, s. 22. 57 & 58 Vict. c. 46, ss. 10 (5), 62, 63.	(i) (a) Court rolls of the manor and all f duly entered therein. (b) Deeds of enfranchisement under Copyhold Act, 1841, and award enfranchisement under the Copyl Acts, 1887 and 1894.
(ii) Enfranchisements, &c. under the Copyhold Act, 1841. 4 & 5 Vict. c. 35, s. 33 (amended by 6 & 7 Vict. c. 23, and 7 & 8 Vict. c. 55). 57 & 58 Vict. c. 46, s. 63.	(ii) Confirmed instrument or schedule of portionment and confirmed agreem (with schedules thereto) sealed with seal of the Copyhold Commissioners u the Copyhold Act, 1841, and any st ment contained in the same or in any n plan, or document annexed thereto.
(iii) Enfranchisements, &c. under the Copyhold Acts, 1852 and 1858. 15 & 16 Vict. c. 51, ss. 9, 33, 49. 21 & 22 Vict. c. 94, ss. 8—10. 50 & 51 Vict. c. 73, ss. 22, 51. 57 & 58 Vict. c. 46, ss. 2, 10, 61 (1).	(iii) (a) Any deed or instrument of enfranch ment executed by the Copyhold C missioners under the Act of 1852. (b) Any confirmed valuation award u that Act, or any confirmed award enfranchisement under the Acts 1858, 1887, or 1894.
(iv) Enfranchisement of lands in which the Crown is interested. 21 & 22 Vict. c. 94, ss. 46, 47. 57 & 58 Vict. c. 46, ss. 68—71, 100.	(iv) The fact and validity of the deed or ins ment of enfranchisement, and the f stated in the certificate written on the or instrument, and the facts referred t the memorial of such deed or instrume
Marriage.	
(i) In Church of England before March 2, 1837. 70th Canon of 1603. *Re Hall's Estate* (1852) 22 L. J. Ch. 177.	(i) Fact and date of marriage in a pa church or chapel according to the rite the Church of England before Marc 1837, and names of parties married.
(ii) In Church of England or according to rites of Quakers or Jews after March 1, 1837. 6 & 7 Will. 4, c. 86, ss. 31, 35, 37, 38.	(ii) Fact and date of marriage in a churc chapel of the Church of England according to the rites of the Quaker of the Jews, after March 1, 1837, and name, age or nonage, condition, ran profession, and residence of the part and the name and rank or professio the father of each party.

(*See next page.*)

Mode of Proof; and see pp. 412, 413.	Notes.
(i) Verified original *or* examined copy (or extract) of court rolls.	When all the lands of a manor are enfranchised, the court rolls may be transferred to the Record Office: see 50 & 51 Vict. c. 73, s. 48, and 57 & 58 Vict. c. 46, s. 64.
(ii) Certified or examined copy (or extract) of the sealed copy deposited with the clerk of the peace of the county where the manor is situate or of that deposited with the steward of the manor *or* the original deposited copy produced by an officer of the Board of Agriculture and Fisheries.	For Board of Agriculture and Fisheries, see 52 & 53 Vict. c. 30, s. 2; 3 Edw. 7, c. 31. See also as to copies issued by the Board of Agriculture and Fisheries, p. 440, below.
(iii) (a) The deed or instrument itself produced and verified by the party or person having custody of it.	
(b) A copy (or extract) sealed and stamped by the Copyhold Commissioners or by their successors the Land Commissioners, or by their successors the Board of Agriculture and Fisheries, of the sealed copy award deposited with them, *or* an examined or certified copy of the copy entered on the court rolls *or* that copy itself, *or* the sealed copy award produced by an officer of the last-mentioned board, *or* the award itself produced by the party or person having custody thereof.	For Land Commissioners, see 45 & 46 Vict. c. 38, s. 48. For Board of Agriculture and Fisheries, see 52 & 53 Vict. c. 30, s. 2; 3 Edw. 7, c. 31. See also as to copies issued by the Board of Agriculture and Fisheries, p. 440, below.
(iv) A copy of the certificate and a copy of the enrolment of memorial of the deed or instrument of enfranchisement, signed and certified as true copies by the Keeper of Land Revenue Records and Enrolments at the Record Office.	
(i) Examined or certified copy of the entry of the marriage made by a minister of the parish in the register of marriages kept in the custody of a minister of the parish, *or* of the entry in the copy register transmitted to and kept in registry of the diocese.	See pp. 241—244. See note under **Baptisms** (p. 427) as to official copy of parish register.
(ii) Copy certified under the hand of the parson, or in the case of Quakers or Jews of the registering officer or secretary respectively, of the entry of the marriage in the marriage register-book in his keeping, *or* a certified copy sealed or stamped with the seal of the general register office of the entry of the marriage in the certified copy register-books kept in that office (*i.e.* those transmitted by the superintendent registrars).	

Title, and Source.	Facts to be Proved.
Marriage—*continued.*	
(iii) In Dissenting Chapel or Registry. 6 & 7 Will. 4, c. 85, ss. 18, 20, 21, 23, 24, 44.	(iii) The same facts as last above-mentioned in respect of marriages in buildings certified as places of religious worship and registered for the solemnization of marriages (as *e.g.* marriages in dissenting churches and chapels) and marriages celebrated in the office of a superintendent registrar.
Marriages before March 2, 1837, not in Church of England, and marriages in Scotland, Ireland, foreign parts or on board ship. (See pp. 241—244, above.)	
Medical Registers, &c.	
(i) Apothecaries. 55 Geo. 3, c. 194, s. 21. 14 & 15 Vict. c. 99, s. 8.	(i) The fact of a person's qualification to practise and sue for charges as an apothecary.
(ii) Chemists and Druggists and Pharmaceutical Chemists. 31 & 32 Vict. c. 121, s. 13.	(ii) The fact of a person's registration or non-registration as a qualified chemist and druggist or pharmaceutical chemist.
(iii) Dentists. 41 & 42 Vict. c. 33, ss. 5, 29. (iv) Medical Practitioners. 21 & 22 Vict. c. 90, ss. 15, 27, 32. (v) Veterinary Surgeon. 44 & 45 Vict. c. 62, ss. 9, 17.	(iii) (iv) (v) The fact of a person's registration or non-registration as qualified to practise and sue for charges as a dentist, medical practitioner or veterinary surgeon respectively.
Merchant Shipping.	
57 & 58 Vict. c. 60, ss. 11, 64, 695.	(i) (a) Name of ship and of port to which she belongs; (b) Details comprised in surveyor's certificate; (c) Particulars respecting her origin stated in declaration of ownership; (d) Name and description of her registered owner or owners, and, if more than one, the proportions in which they are interested in her.
ss. 64 (2) (b) (c), 695.	(ii) The registration of a ship and the contents of the certificate of registry and any endorsement thereon.
(*See next page.*)	

Mode of Proof; and see pp. 412, 413.	Notes.
ii) Copy certified under the hand of the registrar of the entry in the marriage register-book in his keeping, *or* certified copy sealed or stamped with the seal of the general register office of the entry in the certified copy register-book kept in that office (*i.e.* those transmitted by the superintendent registrars).	
(i) Certificate of the qualification as an apothecary under the common seal of the Society of the Art and Mystery of Apothecaries of the City of London. ii) A copy of the Registers of Pharmaceutical Chemists and Chemists and Druggists, printed and published in pursuance of the Act, *or* a certificate under the hand of the registrar countersigned by the president and two members of the council of the Pharmaceutical Society. ii) (iv) (v) A copy of the register of dentists, medical register, or register of veterinary surgeons respectively, printed and published in pursuance of the Act relating thereto respectively, *or*, in case the fact is not entered in such copy register, a copy of the entry in the register certified under the hand of the registrar.	
Semble: Original register-book produced from custody of registrar or other person having the lawful custody thereof, *or* examined or certified copy thereof or of the register kept by the Registrar-general of Shipping and Seamen, *or* in the case of (b) and (c), the original certificate of registry signed by the registrar or other proper officer and the original declaration respectively, *or* examined or certified copies thereof.) The certificate of registry signed by the registrar or other proper officer and the endorsement thereon similarly signed, *or* an examined copy thereof, *or* a copy certified as a true copy by the officer to whose custody the original was entrusted.	

Title, and Source.	Facts to be Proved.
Merchant Shipping —*contd.*	
ss. 64 (d), 695.	(iii) A declaration made in pursuance of Pa of the Act in respect of a British sh and the matters stated therein.
ss. 100, 101, 695.	(iv) Certificate of competency of officer, and matters duly stated therein, and the rec of such certificates and of the suspendi cancelling or altering of the same k by the Registrar-general of Shipping a Seamen or other person directed to kee and all matters duly stated therein.
ss. 229, 695.	(v) Certified copy of entry of desertion.
ss. 239—243, 256, 695, 715.	(vi) Entries made in the official log-book and matters duly stated therein.
s. 254.	(vii) Birth or death at sea.
ss. 256, 695. Cf. ss. 253, 255.	(viii) All documents delivered or transmitted or retained by a superintendent or offi of customs in pursuance of the Act.
ss. 334, 695.	(ix) A certificate of a Secretary of Sta governor or consular agent, stating amount of the expenses incurred in resp of a wrecked passenger or for forwardi a passenger to his destination, includi the cost of maintaining the passen until so forwarded, and of all necess bedding, provision and stores; and fact that the same were duly incurred.
s. 691.	(x) Depositions of witness who cannot be p duced.
ss. 695, 719, 720.	(xi) All documents made, issued or written or under the direction of the Board Trade and sealed with the seal of Board or signed by their secretary or assistant secretary, or (if a certificate) an officer of the marine department.
Military Affairs. (See **Army and Navy**, and **Crown**, pp. 422, 424, 438, above.)	
Mines. **Coal.** 50 & 51 Vict. c. 58, s. 56. 59 & 60 Vict. c. 43, s. 1. **Metalliferous.** 35 & 36 Vict. c. 77, s. 30.	The terms of special rules established in s mine, and the fact that they have been d established according to the Act, and h been signed by the inspector.

Mode of Proof; and see pp. 412, 413.	Notes.
(iii) The declaration itself *or* an examined *or* certified copy as last mentioned. (iv) The original certificate or record respectively or a copy signed and certified by such Registrar-general or person, or an examined copy. (v) The certified copy itself *or* an examined *or* certified copy as above. (vi) The official log-book, *or* a copy (or extract) thereof signed and certified as a true copy by the superintendent or other officer having custody thereof, *or* an examined copy thereof. (vii) See p. 244, above. (viii) The original documents *or* examined *or* certified copies as above. (ix) The certificate under the hand of the Secretary of State, governor or consular officer, stating the circumstances of the case and the total amount of the expenses, *or* an examined *or* certified copy thereof, as above. (x) See p. 258, above. (xi) The original document or a copy signed and certified as a true copy by the officer having custody thereof, or an examined copy of the document.	
A copy, certified by an inspector under the Act, of such special rules.	

Title, and Source.	Facts to be Proved.
Naturalisation, &c. 33 & 34 Vict. c. 14, s. 12.	(i) The fact that a person has made a declar tion of nationality or of alienage and t date thereof. (ii) A certificate of naturalisation or one readmission to British nationality. (iii) All facts and matters duly entered in regi ters kept under the Act.
Navy. (See **Army and Navy** and **Crown**, pp. 422, 424, 438, above.)	
Newspapers. 44 & 45 Vict. c. 60, ss. 8, 9, 15.	The fact of the registration of a newspaper, i title, and the names, occupations and plac of business and of residence of the proprieto thereof.
Ordnance Survey. 4 & 5 Vict. c. 22, s. 30.	The boundaries of any county, hundred, cit borough, town, parish, burgh royal, parli mentary burgh, burgh of regality a baronry, and of any extra-parochial a other place, district or division, by whats ever denomination known or called (but n the boundaries of private properties wheth described with reference to any such bou daries aforesaid or not).
Parliament. (i) Private Acts, &c. 8 & 9 Vict. c. 113, s. 3. 45 Vict. c. 9, s. 2. 52 & 53 Vict. c. 63, s. 9. (ii) Journals. Ibid.	(i) Private and local and personal Acts n being public Acts. (ii) Contents of journals of either House a facts therein stated.

Mode of Proof; and see pp. 412, 413.	Notes.
(i) Production of the original declaration or of a copy thereof certified to be a true copy by a secretary of state or by some person duly authorised by him. (ii) Production of the original certificate or a copy thereof certified as above. (iii) Copies certified by the officer having custody thereof.	
A copy of the entry in or extract from the register of newspaper proprietors in the principal office of the Registrar of Joint Stock Companies, certified by the registrar or his deputy or under the official seal of the registrar.	
Semble, a copy, printed and published under Government authority, of the Ordnance Survey relating to such county, &c.	See pp. 228, 229.
(i) A copy of the Act printed by the King's printers or under the superintendence or authority of His Majesty's Stationery Office. (ii) Copy printed by the King's printers or the printers to either House of Parliament or under the superintendence or the authority of His Majesty's Stationery Office.	See pp. 21, 239.

Title, and Source.	Facts to be Proved.
Patents of Invention, Designs and Trade-Marks.	
46 & 47 Vict. c. 57.	
(i) Patents.	(i) (a) Patents, specifications, disclaimers, affi
s. 89, Rules 1883, r. 76.	davits, statutory declarations and oth
s. 5, Rules 1883, rr. 8, 9.	public documents (as *e.g.* application
	in the Patent Office.
ss. 23, 84, 88, 89, 114.	(b) All matters directed or authorised by th
	Act to be inserted in the register
	patents, as *e.g.* names and addresses
	grantees of patents, notifications
	assignments and of transmissions
	patents, of licences under patents, an
	of amendments, extensions and revoc
	tions of patents, and such other matte
	affecting the validity or proprietorshi
	of patents as may from time to tim
	be prescribed.
s. 96.	(c) Fact and contents of any entry and th
	doing or not doing of any matter
	thing which by the Act or Gener
	Rules thereunder the comptroller
	authorised to make or do.
(ii) Designs.	(ii) (a) Due registration of a design.
ss. 49, 96.	
ss. 52, 55, 88, 89.	(b) Any matters authorised by or in purs
	ance of the Act to be entered in th
	register of designs, as *e.g.* names an
	addresses of proprietors of register
	designs and notifications of assignmen
	and transmissions thereof.
(iii) Trade-Marks.	(iii) The existence of a trade-mark, the nam
5 Edw. 7, ss. 4, 6, 7, 17, 28—41, 50, 51.	and address of its proprietor, and notific
	tions of assignments and of transmissio
	thereof and such other matters as may
	from time to time prescribed to be regi
	tered.
Public Bodies. (See "Corporations," &c., pp. 436, 438.)	
Public Records.	
1 & 2 Vict. c. 94, ss. 11, 12, 13.	Contents of public records (for the various doc
	ments comprised under this title, and the ag
	at which they are transferred to the Reco
	Office, see Scargill Bird's Guide to the Pub
	Records, and the annual reports of the Deput
	Keeper of the Public Records).

Mode of Proof; and see pp. 412, 413.	Notes.
(i) (a) Printed or written copy or extract, certified by the comptroller and sealed with the seal of the Patent Office, of or from any such patent or other document respectively. (b) Printed or written copy or extract, certified by the comptroller and sealed with the seal of the Patent Office, of or from the register of patents at the Patent Office. (c) Certificate under the hand of the comptroller stating such fact, contents, &c., &c. respectively.	
(i) (a) Original certificate of registration, or in case of its loss, a copy thereof, granted by the comptroller. (b) Printed or written copy or extract certified by the comptroller and under the seal of the Patent Office of or from the register of designs in the Patent Office (subject to the restrictions imposed by sect. 52, as modified by sects. 5 and 6 of 51 & 52 Vict. c. 50). (ii) The original certificate of registration under the hand of the registrar (the Comptroller-General of patents, designs and trade-marks), or a printed or written copy (or extract) of the register certified by the registrar and sealed with the seal of the Patent Office.	
copy examined and certified as a true and authentic copy by the deputy-keeper of the records or by an assistant record keeper, and sealed or stamped with the seal of the Record Office.	

Title, and Source.	Facts to be Proved.
Sea Fisheries. 31 & 32 Vict. c. 45, ss. 42, 49. For **Salmon and Fresh Water Fisheries,** see above, p. 444.	The fact that the limits of any oyster and mu fishery have been duly buoyed or otherw marked, or that notices of the limits have b duly published, posted, or distributed, or t notice of the provisions of the order or relating to the fishery have been duly publish
Solicitors and Conveyancers. 23 & 24 Vict. c. 127, s. 22.	The fact that a person is or is not qualified practise as a solicitor or conveyancer.
Succession by Will or Intestacy. (i) To Personal Estate. 20 & 21 Vict. c. 77, ss. 22, 29, 46, 52, 69, and see forms in App. 2 to Probate Court Rules.	(i) (a) Disposition by will of persona (whether including realty or not). (b) Succession to personalty upon int tacy. (c) Disposition by will of persona (whether including realty or not) which administration is granted w the will annexed.
(ii) To Real Estate of a person dying after the 31st December, 1897. 60 & 61 Vict. c. 65, s. 1.	(ii) Same facts, reading "realty" "personalty."
(iii) To Real Estate of a person dying before 1st January, 1898. 20 & 21 Vict. c. 77, s. 64. *Hilliard* v. *Eiffe* (1874) L. R. 7 H. L. 39. Cf. *Re Tomlinson* (1881) 6 P. D. 209. *Re Cubbon* (1886) 11 P. D. 169. *Re Hornbuckle* (1890) 15 P. D. 149.	(iii) (a) Disposition of realty by a will whic entitled to probate as disposing als personalty or containing appointm of an executor. (b) Disposition of realty by will which not entitled to probate.

Mode of Proof; and see pp. 412, 413.	Notes.
certificate under the hand of one of the secretaries r assistant secretaries of the Board of Trade, or of heir successors the Board of Agriculture and Fisheries, certifying those facts.	For the transfer to the Board of Agriculture and Fisheries, see 3 Edw. 7, c. 31.
copy of the Law List published in pursuance of the ct; provided that, if a person's name does not ppear in the list, his qualification as a solicitor may e proved by an extract from the roll of solicitors, ertified under the hand of the secretary of the aw Society or of the registrar for the time being.	
) (a) The probate of the will, *or* an exemplification of the grant of the probate, *or* an official copy of the will. (b) Letters of administration, *or* an exemplification thereof, *or* an official certificate of the grant of such letters. (c) Letters of administration with copy will annexed, *or* an exemplification thereof, *or* an official copy of the grant of such letters with will annexed.) *Semble*, same modes of proof respectively.	
) (a) The probate of the will or letters of administration with copy will annexed, *or* an official copy of same respectively, after proof in either case by the party adducing it that he gave his opponent notice in writing 10 days before the trial of his intention to give such document in evidence in proof of such disposition, unless his opponent within 4 days of the receipt thereof has served on him a counter-notice that he disputes the validity of such disposition. If the 10 days' notice was not served or a 4 days' counter-notice was served, the will must be proved by or through attesting witnesses as explained above, pp. 378—381. (b) Proof of the will by or through attesting witnesses. See pp. 378—381.	

APPENDIX B.

STATUTE OF FRAUDS (29 Car. 2, c. 3), s. 4.

4. And . . . from and after the said fower and twentyeth day of June noe action shall be brought whereby to charge any executor or administrator upon any speciall promise to answere damages out of his owne estate or whereby to charge the defendant upon any speciall promise to answere for the debt default or miscarriages of another person or to charge any person upon any agreement made upon consideration of marriage or upon any contract or sale of lands tenements or hereditaments or any interest in or concerning them or upon any agreement that is not to be performed within the space of one yeare from the makeing thereof unlesse the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writeing and signed by the partie to be charged therewith or some other person thereunto by him lawfully authorised.

MERCANTILE LAW AMENDMENT ACT, 1856 (19 & 20 Vict. c. 97), s. 3.

No special promise to be made by any person to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.

SALE OF GOODS ACT, 1893 (56 & 57 Vict. c. 71), s. 4.

4.—(1) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

(4) The provisions of this section do not apply to Scotland.

AN ACT FOR AMENDING THE LAW OF EVIDENCE AND PRACTICE ON CRIMINAL TRIALS.

(28 Vict. c. 18.)

1. The provisions of section two of this Act shall apply to every trial for felony or misdemeanor; and the provisions of sections from three to eight, inclusive, of this Act shall apply to all Courts of Judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence.

2. If any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel whether he or they intend to adduce evidence, and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendants; and upon every trial for felony or misdemeanor, whether the prisoners or defendants, or any of them, shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be allowed if he or they shall think fit, to open his or their case or cases respectively; and after the conclusion of such opening or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be entitled to examine such witnesses as he or they may think fit, and when all the evidence is concluded to sum up the evidence respectively; and the right of reply, and practice and course of proceedings, save as hereby altered, shall be as at present.

3. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

4. If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

5. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject-matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit.

6. A witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court where the offender was convicted, or by the deputy of such clerk or officer (for

which certificate a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same.

7. It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved as if there had been no attesting witness thereto.

8. Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute.

9. The word "counsel" in this Act shall be construed to apply to attorneys in all cases where attorneys are allowed by law or by the practice of any Court to appear as advocates.

10. This Act shall not apply to Scotland.

CRIMINAL EVIDENCE ACT, 1898 (61 & 62 Vict. c. 36).

1. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows:—

(a) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application:

(b) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution:

(c) The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged:

(d) Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage:

(e) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged:

(f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(iii) he has given evidence against any other person charged with the same offence.

(g) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the Court, give his evidence from the witness-box or other place from which the other witnesses give their evidence:

(h) Nothing in this Act shall affect the provisions of section eighteen of the Indictable Offences Act, 1848, or any right of the person charged to make a statement without being sworn.

2. Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution.

3. In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply.

4.—(1) The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged.

(2) Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

5. In Scotland, in a case where a list of witnesses is required, the husband or wife of a person charged shall not be called as a witness for the defence, unless notice be given in the terms prescribed by section thirty-six of the Criminal Procedure (Scotland) Act, 1887.

6.—(1) This Act shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of this Act, except that nothing in this Act shall affect the Evidence Act, 1877.

(2) But this Act shall not apply to proceedings in courts martial unless so applied—

(a) as to courts martial under the Naval Discipline Act, by general orders made in pursuance of section sixty-five of that Act; and

(b) as to courts martial under the Army Act by rules made in pursuance of section seventy of that Act.

7.—(1) This Act shall not extend to Ireland.

(2) This Act shall come into operation on the expiration of two months from the passing thereof.

(3) This Act may be cited as the Criminal Evidence Act, 1898.

SCHEDULE.

ENACTMENTS REFERRED TO.

Session and Chapter.	Short Title.	Enactments referred to.
5 Geo. 4, c. 83	The Vagrancy Act, 1824	The enactment punishing a man for neglecting to maintain or deserting his wife or any of his family.
8 & 9 Vict. c. 83	The Poor Law (Scotland) Act, 1845.	Section eighty.
24 & 25 Vict. c. 100 ..	The Offences against the Person Act, 1861.	Sections forty-eight to fifty-five.
45 & 46 Vict. c. 75 ..	The Married Women's Property Act, 1882.	Section twelve and section sixteen.
48 & 49 Vict. c. 69 ..	The Criminal Law Amendment Act, 1885.	The whole Act.
57 & 58 Vict. c. 41 ..	The Prevention of Cruelty to Children Act, 1894.	The whole Act.

APPENDIX C.

ORDER XXXI.

Discovery and Inspection.

1. For this see p. 176, above.

2. For this see p. 176, above.

3. In adjusting the costs of the cause or matter inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court or judge, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

4. Interrogatories shall be in the Form No. 6 in Appendix B., with such variations as circumstances may require. (This is Form No. 3 on p. 479, below.)

5. If any party to a cause or matter be a body corporate or a joint-stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly.

6. Any objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant, or not bonâ fide for the purpose of the cause or matter, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

7. Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary, or scandalous ; and any application for this purpose may be made within seven days after service of the interrogatories.

8. Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as a judge may allow.

9. An affidavit in answer to interrogatories shall, unless otherwise ordered by a judge, if exceeding 10 folios, be printed, and shall be in the Form No. 7 in Appendix B., with such variations as circumstances may require. (This is Form No. 4 on p. 479, below.)

10. No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court or a judge on motion or summons.

11. If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court or a judge for an order requiring him to answer, or to answer further, as the case may be. And an

order may be made requiring him to answer or answer further, either by affidavit or by vivâ voce examination, as the judge may direct.

12. For this rule see pp. 361, 362, above.

13. The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which, if any, of the documents therein mentioned he objects to produce, and it shall be in the Form No. 8 in Appendix B., with such variations as circumstances may require. (This is Form 6 on p. 480, below.)

14. It shall be lawful for the Court or a judge, at any time during the pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as the Court or judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

15. For this rule see p. 362, above.

16. Notice to any party to produce any documents referred to in his pleading or affidavits shall be in the Form No. 9 in Appendix B., with such variations as circumstances may require. (This is Form No. 7 on p. 480, below.)

17. The party to whom such notice is given shall, within 2 days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in rule 13, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within 4 days from the receipt of such notice, deliver to the party giving the same a notice stating a time within 3 days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in the Form No. 10 in Appendix B., with such variations as circumstances may require. (This is Form No. 8 on p. 481, below.)

18.—(1) If the party served with notice under rule 17 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his solicitor, the Court or judge may, on the application of the party desiring it, make an order for inspection in such place and in such manner as he may think fit: Provided that the order shall not be made when and so far as the Court or a judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

(2) Any application to inspect documents, except such as are referred to in the pleadings, particulars, or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court or judge shall not make such order for inspection of such documents when and so far as the Court or judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

19. An order upon the lord of a manor to allow limited inspection of the Court rolls may be made on the application of a copyhold tenant supported by an affidavit that he has applied for inspection, and that the same has been refused.

19A.—(1) Where inspection of any business books is applied for, the Court or a judge may, if they or he shall think fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the

original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations, or alterations. Provided that, notwithstanding that such copy has been supplied, the Court or a judge may order inspection of the book from which the copy was made.

(2) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court or a judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

(3) The Court or a judge may, on the application of any party to a cause or matter at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been in his possession or power; and, if not then in his possession, when he parted with the same, and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the cause or matter, or to some of them.

20. If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court or a judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the cause or matter, or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

21. If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his action, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court or a judge for an order to that effect, and an order may be made accordingly.

22. Service of an order for interrogatories or discovery or inspection made against any party on his solicitor shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order.

23. A solicitor upon whom an order against any party for interrogatories or discovery or inspection is served under the last preceding rule, who neglects without reasonable excuse to give notice thereof to his client, shall be liable to attachment.

24. Any party may, at the trial of a cause, matter, or issue, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always, that in such case the judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in.

25. In every cause, or matter, the costs of discovery, by interrogatories or otherwise, shall, unless otherwise ordered by the Court or a judge, be secured in the first instance, as provided by rule 26 of this order, by the party seeking such discovery, and shall be allowed as part of his costs where, and only where, such discovery shall appear to the judge at the trial, or, if there is no trial, to the Court or a judge, or shall appear to the taxing officer, to have been reasonably asked for.

23. Any party seeking discovery by interrogatories shall before delivery of interrogatories, pay into Court to a separate account in the action, to be called "Security for Costs Account," to abide further order, the sum of 5*l.*, and, if the number of folios exceeds five, the further sum of 10*s.* for every additional folio. Any party seeking discovery otherwise than by interrogatories shall, before making application for discovery, pay into Court, to a like account, to abide further order, the sum of 5*l.*, and may be ordered further to pay into Court as aforesaid such additional sum as the Court or a judge shall direct. The party seeking discovery shall, with his interrogatories or order for discovery, serve a copy of the receipt for the said payment into Court, and the time for answering or making discovery shall in all cases commence from the date of such service. The party from whom discovery is sought shall not be required to answer or make discovery unless and until the said payment has been made.

27. Unless the Court or a judge shall at or before the trial otherwise order, the amount standing to the credit of the "Security for Costs Account" in any cause or matter, shall after the cause or matter has been finally disposed of be paid out to the party by whom the same was paid in on his request, or to his solicitor on such party's written authority, in the event of the costs of the cause or matter being adjudged to him, but, in the event of the Court or judge ordering him to pay the costs of the cause or matter, the amount in Court shall be subject to a lien for the costs ordered to be paid to any other party.

27A. If after a cause or matter has been finally disposed of, by consent or otherwise, no taxation of costs shall be required, the taxing officer, master, or chief clerk (as the case may be) may, either by consent of the parties, or on being satisfied that any party who has lodged any money to the "Security for Costs Account" in such cause or matter has become entitled to have the same paid out to him, give a certificate to that effect, which certificate shall be acted on and have effect in all respects as if the same had been an order made in the said cause or matter.

28. In any action against or by a sheriff in respect of any matters connected with the execution of his office, the Court or a judge may, on the application of either party, order that the affidavit to be made in answer either to interrogatories or to an order for discovery shall be made by the officer actually concerned.

29. This order shall apply to infant plaintiffs and defendants and to their next friends and guardians ad litem.

ORDER XXXII.

Admissions.

1. Any party to a cause or matter may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.

2. For this rule see p. 382, above.

3. A notice to admit documents shall be in the Form No. 11 in Appendix B., with such variations as circumstances may require. (This is Form No. 9 on p. 481, below.)

4. For this rule see p. 177, above.

5. A notice to admit facts shall be in the Form No. 12 in Appendix B., and admissions of facts shall be in the Form No. 13 in Appendix B., with such variations as circumstances may require. (These are Forms Nos. 1 and 2 on pp. 478, 479, below.)

6. Any party may at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court or a judge may upon such application make such order, or give such judgment, as the Court or judge may think just.

7. An affidavit of the solicitor or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof be required.

8. Notice to produce documents shall be in the Form No. 14 in Appendix B., with such variations as circumstances may require. An affidavit of the solicitor, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served. (This is Form No. 5 on p. 480, below.)

9. If a notice to admit or produce comprises documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice.

ORDER XXXVII.

I. Evidence Generally.

1. For this rule see p. 264, above.

2. In default actions in rem, and in references in Admiralty actions, evidence may be given by affidavit.

3. For this rule see p. 250, above.

4. For this rule see p. 412, above.

5. For this rule see p. 251, above.

II. Examination of Witnesses.

6. An order for a commission to examine witnesses shall be in the Form No. 36 in Appendix K., and the writ of commission shall be in the Form No. 13 in Appendix J., with such variations as circumstances may require. (For this see Form 10, p. 482, below.)

6A. (For first part of this rule see p. 252, above.) The Forms 1 and 2 in the Appendix hereto shall be used for such order and request respectively, with such variation as circumstances may require, and may be cited as Forms 37A and 37B in Appendix K. (For these see Forms 11 and 12, pp. 482, 483, below.)

7. For this rule see p. 364, above.

8. For this rule see p. 364, above.

9. Any person required to attend for the purpose of being examined or of producing any document, shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in Court.

10. Where any witness or person is ordered to be examined before any officer of the Court, or before any person appointed for the purpose, the person taking the examination shall be furnished by the party on whose application the order was made with a copy of the writ and pleadings, if any, or with a copy of the documents necessary to inform the person taking the examination of the questions at issue between the parties.

11. The examination shall take place in the presence of the parties, their counsel, solicitors, or agents, and the witnesses shall be subject to cross-examination and re-examination.

12. The depositions taken before an officer of the Court, or before any other person appointed to take the examination, shall be taken down in writing by or in the presence of the examiner, not ordinarily by question and answer, but so as to represent as nearly as may be the statement of the witness, and when completed shall be read over to the witness and signed by him in the presence of the parties, or such of them as may think fit to attend. If the witness shall refuse to sign the depositions, the examiner shall sign the same. The examiner may put down any particular question or answer if there should appear any special reason for doing so, and may put any question to the witness as to the meaning of any answer, or as to any matter arising in the course of the examination. Any questions which may be objected to shall be taken down by the examiner in the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement in the depositions, but he shall not have power to decide upon the materiality or relevancy of any question.

13. If any person duly summoned by subpœna to attend for examination shall refuse to attend, or if, having attended, he shall refuse to be sworn or to answer any lawful question, a certificate of such refusal, signed by the examiner, shall be filed at the Central Office, and thereupon the party requiring the attendance of the witness may apply to the Court or a judge ex parte or on notice for an order directing the witness to attend, or to be sworn, or to answer any question, as the case may be.

14. If any witness shall object to any question which may be put to him before an examiner, the question so put, and the objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the Central Office to be there filed, and the validity of the objection shall be decided by the Court or a judge.

15. In any case under the two last preceding rules, the Court or a judge shall have power to order the witness to pay any costs occasioned by his refusal or objection.

16. When the examination of any witness before any examiner shall have been concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the Central Office, and there filed.

17. The person taking the examination of a witness under these rules may, and if need be shall, make a special report to the Court touching such examination and the conduct or absence of any witness or other person thereon, and the Court or a judge may direct such proceedings and make such order as upon the report they or he may think just.

18. For this rule see p. 253, above.

19. Any officer of the Court, or other person directed to take the examination of any witness or person, may administer oaths.

20. Any party in any cause or matter may by subpœna ad testificandum or duces tecum require the attendance of any witness before an officer of the Court, or other person appointed to take the examination, for the purpose of using his evidence upon any proceeding in the cause or matter in like manner as such witness would be bound to attend and be examined at the hearing or trial; and any party or witness having made an affidavit to be used or which shall be used on any proceeding in the cause or matter shall be bound on being served with such subpœna to attend before such officer or person for cross-examination.

21. Evidence taken subsequently to the hearing or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial.

22. The practice with reference to the examination, cross-examination, and re-examination of witnesses at a trial shall extend and be applicable to evidence taken in any cause or matter at any stage.

23. The practice of the Court with respect to evidence at a trial, when applied to evidence to be taken before an officer of the Court or other person in any cause or matter after the hearing or trial, shall be subject to any special directions which may be given in any case.

24. No affidavit or deposition filed or made before issue joined in any cause or matter shall without special leave of the Court or a judge be received at the hearing or trial thereof, unless within one month after issue joined, or within such longer time as may be allowed by special leave of the Court or a judge, notice in writing shall have been given by the party intending to use the same to the opposite party of his intention in that behalf.

25. All evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter.

PART III. SUBPŒNA.

Rules 26—34.

PART IV. PERPETUATING TESTIMONY.

35. For this rule see p. 254, above.

36. In all actions to perpetuate testimony touching any honour, title, dignity, or office, or any other matter or thing in which the Crown may have any estate or interest, the Attorney-General may be made a defendant, and in all proceedings in which the depositions taken in any such action, in which the Attorney-General was so made a defendant, may be offered in evidence, such depositions shall be admissible notwithstanding any objection to such depositions upon the ground that the Crown was not a party to the action in which such depositions were taken.

37. Witnesses shall not be examined to perpetuate testimony unless an action has been commenced for the purpose.

38. No action to perpetuate the testimony of witnesses shall be set down for trial.

39. The examination of any witness or person ordered to be taken under rules 1 and 5 of this order shall, in any cause or matter in any division of the High Court, unless the Court or a judge shall otherwise direct, be taken before one of the examiners of the Court: Provided that nothing in this rule shall interfere with the practice as to examinations in Admiralty actions.

40. A sufficient number of barristers-at-law, of not less than three years' standing, shall be from time to time appointed by the Lord Chancellor to act as examiners of the Court for a period not exceeding five years, and shall be at any time removable by the same authority.

(Rules 41 to 44, and 48 to 51A, deal with the rotations of work among the examiners of the Court, their remuneration, &c.)

45. In determining the place and time at which an examination shall be taken, the examiner shall have regard to the convenience of the witnesses or persons to be examined and all the circumstances of the case; and he shall proceed with such examination at the place and time appointed, and subject to such adjournment as he shall think necessary or just, continue the same de die in diem.

46. The examiner may, with the consent in writing of all parties, take the examination of any witnesses or persons in addition to those named or provided for in the order, and shall annex such consent to the original depositions.

47. Upon the completion of an examination taken before an examiner of the Court, he shall indorse the original depositions with a note, authenticated by his signature, certifying the number of hours or days (as the case may be) exclusively employed thereupon, and the fees received in respect thereof.

(See note after rule 40.)

52. Every examiner of the Court, and every other person appointed to take an examination under this order, shall indorse on the depositions, when he transmits them to the Central Office, a statement of the hours within which the examination began and ended.

53. An examiner shall not be required to transmit any deposition, to be filed at the Central Office, until all fees and expenses due to him in respect of that deposition have been paid.

(Rules 54 to 59 deal with evidence taken in this country to be used before foreign tribunals.)

APPENDIX D.

FORMS.

No. 1.

Notice to Admit Facts.

[*Title of Action.*]

Take notice that the plaintiff [*or* defendant] in this cause requires the defendant [*or* plaintiff] to admit, for the purposes of this cause only, the several facts respectively hereunder specified; and the defendant [*or* plaintiff] is hereby required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this cause.

Dated, &c.

G. D., solicitor [*or* agent] for the plaintiff [*or* defendant].

To E. F., solicitor [*or* agent] for the defendant [*or* plaintiff].

The facts, the admission of which is required, are—

1. That John Smith died on the 1st of January, 1870.
2. That he died intestate.
3. That James Smith was his only lawful son.
4. That Julius Smith died on the 1st of April, 1876.
5. That Julius Smith never was married.

No. 2.

Admission of Facts, pursuant to Notice.

[*Title of Action.*]

The defendant [*or* plaintiff] in this cause, for the purposes of this cause only, hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of any such facts, or any of them, as evidence in this cause.

Provided that this admission is made for the purposes of this action only, and is not an admission to be used against the defendant [*or* plaintiff] on

any other occasion, or by anyone other than the plaintiff [*or* defendant, *or party requiring the admission*].

Delivered, &c.

E. F., solicitor [*or* agent] for the defendant [*or* plaintiff].

To G. H., solicitor [*or* agent] for the plaintiff [*or* defendant].

Facts admitted.	Qualifications or Limitations, if any, subject to which they are admitted.
1. That John Smith died on the 1st of January, 1870.	1.
2. That he died intestate.	2.
3. That James Smith was his lawful son.	3. But not that he was his only lawful son.
4. That Julius Smith died.	4. But not that he died on the 1st of April, 1876.
5. That Julius Smith never was married.	5.

No. 3.

Interrogatories.

[*Title of Cause or Matter.*]

Interrogatories on behalf of the above-named [*plaintiff*, or *defendant C. D.*] for the examination of the above-named [*defendants E. F.* and *G. H.*, or *plaintiff*].

1. Did not, &c.
2. Has not, &c.

&c. &c. &c.

[*The defendant E. F. is required to answer the interrogatories numbered* .]

[*The defendant G. H. is required to answer the interrogatories numbered* .]

No. 4.

Answer to Interrogatories.

[*Title of Cause or Matter.*]

The answer of the above-named defendant E. F. to the interrogatories for his examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named E. F., make oath and say as follows:—

Sworn, &c.

No. 5.

Notice to Produce Documents at the Trial.

[*Title.*]

Take notice that you are hereby required to produce and show to the Court on the trial of this all books, papers, letters, copies of letters, and other writings and documents in your custody, possession, or power, containing any entry, memorandum, or minute relating to the matters in question in this , and particularly [*here describe the particular documents*].

Dated the day of , 18 .

To the above-named

h solicitor *or* agent .

(Signed) , of ,
agent for , solicitor
for the above-named .

No. 6.

Affidavit as to Documents.

[*Title of Cause or Matter.*]

I, the above-named defendant C. D., make oath and say as follows :—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. That [*here state upon what grounds the objection is made, and verify the facts as far as may be*].

4. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

5. The last-mentioned documents were last in my possession or power on *state when*].

6. That [*here state what has become of the last-mentioned documents and in whose possession they now are*].

7. According to the best of my knowledge, information, and belief, I have not now, and never had in my possession, custody, or power, or in the possession, custody, or power of my solicitors or agents, solicitor or agent, or in the possession, custody or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto.

No. 7.

Notice to Produce Documents for Inspection under Order XXXI.

[*Title of Cause or Matter.*]

Take notice that the [*plaintiff* or *defendant*] requires you to produce for his inspection the following documents referred to in your [*statement of claim*, or *defence*, or *affidavit, dated the day of* A.D.].

[*Describe documents required.*]

X. Y., Solicitor to the .

To Z., Solicitor for .

No. 8.

Notice to inspect Documents under Ord. XXXI.

[*Title of Cause or Matter.*]

Take notice that you can inspect the documents mentioned in your notice of the day of A.D. [*except the deed numbered in that notice*] at [*insert place of inspection*] on Thursday next the instant between the hours of 12 and 4 o'clock.

Or, that the [*plaintiff* or *defendant*] objects to giving you inspection of the documents mentioned in your notice of the day of A.D. , on the ground that [*state the ground*] :—

No. 9.

Notice to admit Documents.

[*Title.*]

Take notice that the plaintiff [*or* defendant] in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [*or* plaintiff], his solicitor or agent, at , on , between the hours of ; and the defendant [*or* plaintiff] is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated, &c. (Signed)

G.H., solicitor [*or* agent] for plaintiff [*or* defendant].

To E.F., solicitor [*or* agent] for defendant [*or* plaintiff].

[*Here describe the documents, the manner of doing which may be as follows :*—]

ORIGINALS.

Description of Documents.	Dates.
Deed of covenant between A.B. and C.D. first part, and E.F. second part	January 1, 1888.
Indenture of lease from A.B. to C.D.	February 1, 1888.
Indenture of release between A.B. and C.D. first part, &c.	February 2, 1878.
Letter—defendant to plaintiff	March 1, 1878.
Policy of insurance on goods by ship "Isabella," on voyage from Oporto to London	December 3, 1877.
Memorandum of agreement between C.D., captain of said ship, and E.F.	January 1, 1848.
Bill of exchange for £100 at three months, drawn by A.B. on and accepted by C.D., indorsed by E.F. and G.H.	May 1, 1849.

COPIES.

Description of Documents.	Dates.	Original or Duplicate served, sent, or delivered, when, how, and by whom.
Register of baptism of A.B. in the parish of X.	January 1, 1848.	
Letter—plaintiff to defendant.	February 1, 1888.	Sent by General Post, February 2, 1888.
Notice to produce papers	March 1, 1888....	Served March 2, 1888, on defendant's attorney by E.F. of .
Record of a judgment of the Court of Queen's Bench in an action, *F.S.* v. *F.N.*	Trinity Term, 10th Vict.	
Letters patent of King Charles II. in the Rolls Chapel.	January 1, 1680.	

No. 10.

Short Order for Issue of Commission to Examine Witnesses.

Upon hearing , and upon reading the affidavit of , filed the day of , 19 , and

It is ordered that the be at liberty to issue a commission for the examination of witnesses on behalf at .

And it is further ordered that the trial of this action be stayed until the return of the said commission [the usual long order to be drawn up, and unless agreed upon by the parties within one week, to be settled by the Master (*or as the case may be*)], and that the costs of this application be .

Dated the day of , 19 .

No. 11.

Order for Issue of Request for Commission.

It is ordered that a letter of request do issue directed to the proper tribunal for the examination of the following witnesses, that is to say :—

E. F., of
G. H., of
and I. J., of

And it is ordered that the depositions taken pursuant thereto when received be filed at the Central Office, and be given in evidence on the trial of this action, saving all just exceptions.

And it is further ordered that the trial of this action be stayed until the said depositions have been filed.

No. 12.

Request for Commission.

[*Heading :—To the President and Judges of, &c., &c., or as the case may be.*]

Whereas an action is now pending in the Division of the High Court of Justice in England, in which A. B. is plaintiff and C. D. is defendant. And in the said action the plaintiff claims

(*endorsement upon writ*).

And whereas it has been represented to the said Court that it is necessary for the purposes of justice and for the due determination of the matters in dispute between the parties, that the following persons should be examined as witnesses upon oath touching such matters, that is to say :—

E. F., of
G. H., of
and I. J., of

And it appearing that such witnesses are resident within the jurisdiction of your honourable Court.

Now I as the President of the said Division of the High Court of Justice have the honour to request, and do hereby request, that for the reasons aforesaid and for the assistance of the High Court of Justice, you as the President and Judges of the said or some one or more of you, will be pleased to summon the said witnesses (and such other witnesses as the agents of the said plaintiff and defendant shall humbly request you in writing so to summon) to attend at such time and place as you shall appoint before some one or more of you, or such other person as according to the procedure of your Court is competent to take the examination of witnesses, and that you will cause such witnesses to be examined upon the interrogatories which accompany this letter of request (or *vivâ voce*) touching the said matters in question in the presence of the agents of the plaintiff and defendant, or such of them as shall, on due notice given, attend such examination.

And I further have the honour to request that you will be pleased to cause the answers of the said witnesses to be reduced into writing, and all books, letters, papers, and documents produced upon such examination to be duly marked for identification, and that you will be further pleased to authenticate such examination by the seal of your tribunal, or in such other way as is in accordance with your procedure, and to return the same, together with such request in writing, if any, for the examination of other witnesses, through his Majesty's Secretary of State for [Foreign Affairs], for transmission to the said High Court of Justice in England.

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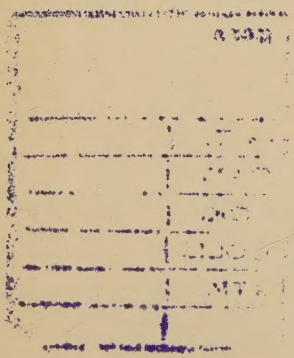

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